

JOURNAL ENTRIES

UNDER THE CODES OF

CIVIL, PROBATE, AND CRIMINAL PROCEDURE

OF THE

STATE OF OHIO

ALSO

UNDER THE SEVERAL STATUTES REGULATING THE MORE
COMMON PROCEEDINGS, WITH NOTES OF THE DECISIONS
OF THE COURTS OF OHIO, AND OTHER STATES
TOUCHING JOURNAL ENTRIES AND

AN APPENDIX OF BILLS OF EXCEPTIONS

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THIRD EDITION, REVISED.

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P R E F A C E .

THE importance of the subject of journal entries will not be questioned. A considerable departure has been made in the modern practice, and under the codes of procedure, from the forms and style used in journal entries under the common law system. Our codes have done away with much of the elaborate practice and complicated form of the common law, and introduced in their stead the simplicity of short forms and ordinary language, but have in no way lessened the necessity for precision and exactness. And while any ordinary and precise language will be sufficient to express an order or judgment of the court, a system of forms has been gradually elaborated from the practice under the codes, and is useful in creating uniformity and in saving the time necessary to a new investigation upon the making of every entry ; and it is with the view of saving this time and labor to attorneys and clerks of courts, rather than with the expectation of introducing to them anything new, that this work is undertaken.

To make the work complete, I have endeavored to present every entry, or at least a form for every entry, authorized by the codes and statutes referred to. Of course, every specific entry that may sometimes be required can not be given, but it is believed that nearly all may be made by slightly modifying those given.

In general, only such notes of decisions have been appended as touch journal entries, and not those on practice at large. I have only gone out of the State for such decisions where none applicable are found here, and when those of another State, generally New York or Kansas, are applicable in a particular manner.

It has been my particular endeavor to make the forms practical, and a great number of them have been obtained by taking those actually drawn by attorneys of standing at the Ohio bar.

E. N. WILD.

CINCINNATI, OHIO, *July 1*, 1876.

PREFACE TO REVISED EDITION.

THE revised statutes of 1880 made so many changes in the codes of procedure, by alterations, additions, and amendments, that a new edition of Journal Entries became necessary. The work has been very much enlarged, containing now about one thousand entries, embracing many under statutes not introduced into the former work. The same order has been followed as under the former codes.

In addition to the former entries, I have added entries in the Probate Courts, making the work much more complete.

I desire to acknowledge the courtesy of Hon. Jacob Burnet, lately Judge of the Court of Common Pleas of Hamilton county, in giving me the benefit of his legal ability on many points of practice under the revised statutes. Also, of Florien Giauque, Esq., editor of "Raff's Guide," and author of "Manual for Guardians," etc.; and of Daniel Herider, the very efficient Chief Deputy Clerk of the Probate Court of Hamilton county, in rendering me valuable assistance in preparing entries for the Probate Court.

E. N. WILD.

CINCINNATI, *February* 28, 1883.

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ABBREVIATIONS USED IN THIS WORK.

AL. —Alabama Reports.

AL. R. —American Law Register.

B. R. —Bankrupt Register.

B. MON. —Ben Monroe, Kentucky.

BEN. —Benedict's Reports.

COW. —Cowen's Reports, New York.

C. S. C. R. —Cincinnati Superior Court Reporter.

C. L. N. —Chicago Legal News.

CAL. —California Supreme Court Reports.

D. —Disney's Reports of the Superior Court of Cincinnati.

H. —Handy's Reports of the Superior Court of Cincinnati.

HOW. PR. —Howard's Practice Reports, New York.

KAN. —Kansas Supreme Court Reports.

L. G. —Law Gazette.

LA. AN. —Louisiana Annual Reports.

ME. —Maine Supreme Court Reports.

PITTS. L. J. —Pittsburg Legal Journal.

s. c. —Same Case.

S. C. R. —Superior Court Reporter.

S. —Sayler's Statutes

S and C. —Swan and Critchfield.

VES. —Vesey's Reports.

W. —Wright's Reports, Ohio.

W. L. M. —Western Law Monthly.

WEND. —Wendell's Reports, New York.

W. L. J. —Western Law Journal.

JOURNAL ENTRIES

UNDER THE

CODE OF CIVIL PROCEDURE OF OHIO.

PRELIMINARY FORMS.

- I. IN THE CIRCUIT COURT.
 - II. IN THE COURT OF COMMON PLEAS.
-

I. IN THE CIRCUIT COURT.

- I. OPENING A REGULAR TERM.
- II. OPENING A SPECIAL TERM.
- III. CLOSING A TERM.
- IV. CONTINUING A REGULAR TERM.
- V. DAILY SESSIONS.

I. OPENING A REGULAR TERM.

The regular term of the Circuit Court may be opened as follows :

The State of Ohio, }
County of ———, } ss.

This present term of the Circuit Court, in and for the county of ———, in the first judicial circuit of the State of Ohio, held in the court-house in the city of ———, county and

state aforesaid, was begun on the — day of —, in the year of our Lord one thousand eight hundred and —.

Present:

HON. A. B.,

HON. C. D.,

HON. E. F.,

*Judges of the Circuit Court in the First
Judicial Circuit of Ohio.*

HON. A. B., presiding.

G. H., Esq.,

Sheriff of — County, Ohio.

C. B., M. D.,

Coroner of — County, Ohio.

Attest:

W. M. T.,

Clerk of the Circuit Court of — County, Ohio.

By F. M.,

Deputy.

II. OPENING A SPECIAL TERM.

The order for a special term authorized by section 450, 82 O. L. 21, should be put upon the journal for preservation; and the record may be as follows, entered upon the journal of the special term at opening:

The State of Ohio, }
County of —, } ss.

This special term of the Circuit Court, in and for the county of —, in the first judicial circuit of the State of Ohio, held in the court-house in the city of —, county and state aforesaid, was begun on the — day of —, in the year of our Lord one thousand eight hundred and —, after thirty days previous notice of the same being given in said county, according to law, in pursuance of the following order made by the judges of said circuit, to wit:

“It appearing that there has been a failure to hold a prescribed term of the Circuit Court in the county of — for this year [*or state other sufficient reason*], it is ordered that a special term of said court be held in the said county of —,

at the county seat thereof, beginning on the — day of —, A. D. 18—.”

Present:

HON. A. B.,

HON. C. D.,

HON. E. F.,

*Judges of the Circuit Court in the First
Judicial Circuit of Ohio.*

HON. A. B., presiding.

G. H., Esq.,

Sheriff of — County, Ohio.

C. B., M. D.,

Coroner of — County, Ohio.

Attest:

S. W. R.,

Clerk of the Circuit Court of — County, Ohio.

By F. M. S.,

Deputy.

III. CLOSING A TERM.

The terms of the Circuit Court, whether regular or special, may be closed with the following formula:

It is ordered that all causes, motions, and matters now pending in this court, and not otherwise disposed of, be, and the same are, hereby continued to the next term thereof.

This present term of this Circuit Court was begun on the — day of —, A. D. one thousand eight hundred and —, and continued from day to day, and from time to time, by regular adjournments, until this — day of —, of the year aforesaid, and is now adjourned without day.

[Signed,]

— —,

Presiding Judge.

IV. CONTINUING A TERM.

When it is necessary to continue a term of the Circuit Court beyond the time allotted to a county, as authorized by section 450, 82 O. L. 21, make an order on the journal of the regular term as follows:

The business of this court requiring a continuance of the present term beyond the time allotted to this county, it is

hereby ordered that the term be continued from day to day until further order.

V. DAILY SESSIONS.

Open the session of each day, after the first, as follows :

Tuesday, January 6, 18—,
—— o'clock A. M.

Court met pursuant to adjournment.

Present :

HON. A. B.,

HON. C. D.,

HON. E. F.,

Judges of the Circuit Court in the ——
Judicial Circuit of Ohio.

HON. A. B., presiding.

Close each day's minutes thus :

Court adjourned to Wednesday, January 7, 1875.

[Signed,]

—— ———,
Presiding Judge.

II.

PRELIMINARY FORMS IN THE COURT OF COMMON PLEAS.

I. ADJOURNED TERMS.

II. SPECIAL TERMS.

III. FORMS IN REGULAR SEPARATE SESSION.

IV. FORMS IN JOINT SESSION.

V. FORMS IN CHAMBERS.

VI. FORMS IN VACATION.

I. ADJOURNED TERMS OF THE COMMON PLEAS COURT.

The order for an adjourned term must be entered on the journal of the regular term, and may be as follows :

SEC. 460. *Order for an adjourned term of court.*

It being necessary, owing to the state of business in this court, it is hereby ordered that an adjourned term thereof be held, for the purpose of completing the business of this regular term, beginning — and continuing until —.

For form of opening entry on the journal of the adjourned term, use, with proper modification, the form given in case of regular term, page 7. For opening and closing of the daily sessions, use forms on page 8.

CLOSING AN ADJOURNED TERM.

Enter upon the journal as follows :

This adjourned term of the Court of Common Pleas of — County, Ohio, was begun on the — day of —, 18—, and continued from day to day and from time to time by regular adjournments until this — day of —, 18—, and is now adjourned without day.

[Signed,]

E. F.,
Judge.

II. SPECIAL TERM OF COMMON PLEAS COURT.

ORDER FOR A SPECIAL TERM—

The order for a special term to be made by the judge and advertised, may be a general one; or it may, by section 462, designate what business will be transacted thereat, and whether a jury or juries shall be summoned. The statute does not provide that this order shall be entered on the journal of the court; but, for purposes of preservation, it is better that it should be. The record may be entered on the journal of the special term, as follows:

The State of Ohio, }
County of —, } ss.

This special term of the Court of Common Pleas, in — county, Ohio, held in the court-house in —, county and state aforesaid, in pursuance of an order duly issued by the Hon. C. D., judge of said court, as hereinafter recorded, and by the clerk duly published, was begun on the — day of —, in the year of our Lord one thousand eight hundred and eighty-two.

Present:

Hon. C. D.,

*Judge of the Court of Common Pleas
of the — Judicial District of Ohio.*

J. H., Esq.,

Sheriff of — County, Ohio.

A. R., M. D.,

Coroner of — County, Ohio.

The order above referred to is in words as follows, to wit:
[*Here copy the order made by the judge.*]

Attest:

W. M. T.,

Clerk of the Court of Common Pleas of — County, Ohio.

By F. M.,

Deputy.

CLOSING A SPECIAL TERM—

This special term of the Court of Common Pleas was begun on the — day of —, 18—, and continued from day

to day, by regular adjournments, until this — day of —, 18—, and is now adjourned without day.

[Signed,]

E. F.,

Judge.

III. FORMS IN REGULAR SEPARATE SESSION OF THE COMMON PLEAS COURT.

OPENING THE TERM.

CLOSING THE TERM.

DAILY SESSIONS.

OPENING THE TERM—

Each term may be opened upon the journal as follows:

The State of Ohio, }
County of —, } ss.

This separate session of the Court of Common Pleas of the — judicial district of the State of Ohio, within and for the county of —, for the term of —, in the year of our Lord one thousand eight hundred and —, held in room No. —, in the court-house in the city of —, county and state aforesaid, was begun on the first Monday, the — day of — in the year aforesaid.

Present:

Hon. E. F.,

*Judge of the Court of Common Pleas
of the — Judicial District of Ohio.*

J. H., Esq.,

Sheriff of — County, Ohio.

A. R., M.D.,

Coroner of — County, Ohio.

Attest:

W. M. T.,

Clerk of the Court of Common Pleas of — County, Ohio.

By F. M.,

Deputy.

CLOSING THE TERM—

Enter upon the journal the following order:

It is ordered that all cases, motions, and matters now pend-

ing this court, not otherwise disposed of, be and the same are hereby continued to the next regular term thereof.

This separate session of this Court of Common Pleas, for the term of —, A. D. 18—, was begun on the first Monday, the — day of —, 18—, and continued from day to day, by regular adjournments, until this — day of —, 18—, and is now adjourned without day.

[Signed,]

E. F.,
Judge.

DAILY SESSIONS—

Open the session of each day, after the first, as follows :

Tuesday, January 6, 1875,
— o'clock, A. M.

Court met pursuant to adjournment.

Present :

HON. A. B.,
Judge.

Close each days' minutes thus :

Court adjourned to Wednesday, January 7, 1875.

[Signed by the judge.]

IV. FORMS IN JOINT SESSION OF THE COMMON PLEAS COURT.

The forms may be the same as in separate session, except that in opening the term, in courts having a presiding judge, say :

Present :

HON. M. F.,
Presiding Judge of the Court of Com-
mon Pleas of the — Judicial
District of Ohio.

HON. J. C.,
Judge of the Court of Common Pleas
of the — Judicial District of Ohio,
etc., etc.

So also, in opening the days' session, the names and titles of all the judges sitting should be given in the form above. The minutes

of each day are signed by the presiding judge, or as directed by the rules of court.¹

The first entry in the joint session minutes of Hamilton County in the January term should be for the appointment of the presiding judge for the year and the assignments for the different judges,² and at other terms for the assignments of the judges.

V. FORMS IN CHAMBERS.

In making Chamber entries, use the following formulary:

IN CHAMBERS, *January* —, 18—.

Before the Hon. S. T., Judge of the Common Pleas Court of the —— Judicial District of Ohio.

[*Title.*]

[*Entry.*]

[Signed,]

S. T.,

Judge.

If the original order has the signature of the judge, it is unnecessary for him to sign the journal.

VI. FORMS IN VACATION.

There are also certain entries which the statute directs shall be made by the clerk on the journal, in vacation, without the order of a judge; as the entering of a mandate from the Supreme Court,³ and the dismissal of a case by the plaintiff after the costs are paid.⁴

In these cases the entries should be made as follows:

OFFICE OF THE CLERK OF THE COURTS OF —— COUNTY, Ohio.
January —, 18—.

[*Title.*]

[*Entry.*]

¹ As to signing the journal, see *post*, page 10.

² By sec. 464.

³ Sec. 5239.

⁴ Sec. 5314, 6th.

JOURNAL ENTRIES.

Journal entries, under the code of this state, include judgments and orders, and a miscellaneous third class of entries, including agreed statements, suggestions on the record, and other like matters.

A judgment is the final determination of the rights of the parties in an action.¹

An order is any direction of a court or judge, made or entered in writing, and not included in a judgment.² A final order is one affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment.³

The term decree, which is defined to be the judgment or sentence of a court of equity,⁴ is scarcely recognized by the code, the decree being included in the general term of judgment.

All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action.⁵ Orders made out of court by a judge, either at Chambers, or when acting as a kind of special master, as such judge, must be forthwith entered by the clerk in the journal of the court, in the same manner as orders made in term.⁶

There is no provision requiring the judge to sign the journal, and it is perfectly valid without his signature. But, as a means of authentication, it is a good practice for him to sign each days' proceedings.

Each separate journal entry must be headed with the number and title of the case in which it is made. If it be a judgment or final order, the names of the parties must be set out in full, and the name of the action set out after the title, as a guide to the indexing clerk—thus:

12,430.	A. B. and H. D. }	<i>Money only.</i>
	v.	
	C. D. and E. F. }	

¹ Code, sec. 5310.

² Code, sec. 5310.

³ Code, sec. 6707.

⁴ Bouvier's Law Dictionary.

⁵ Code, secs. 5331, 4963.

⁶ Code, sec. 4963.

Attorneys, in drawing judgment entries and final orders for the clerk, should be particular in this, that there may be no error in indexing the judgment.

The title of a case in which the proceedings are all *ex parte*, is, in form, as follows :

12,431. In the matter of the ap-
plication of A. B. for
a change of name. }

TITLE I.

PROCEDURE IN THE COURTS OF COMMON PLEAS AND SUPERIOR COURTS, AND IN DISTRICT COURTS ON APPEAL.

DIVISION I. GENERAL AND PRELIMINARY PROVISIONS.

II. COMMENCEMENT OF ACTIONS—JURISDICTION— ISSUE.

III. TRIAL.

IV. JUDGMENT.

V. ENFORCEMENT OF JUDGMENT.

VI. PROVISIONAL REMEDIES.

VII. SPECIAL PROCEEDINGS.

DIVISION I.—GENERAL AND PRELIMINARY PROVISIONS.

CHAPTER II.

SPECIFIC DUTIES OF CERTAIN OFFICERS.

1. (Sec. 4967.) *Appointment of person to execute process.*
[*Title.*]

It appearing to the court that the sheriff and coroner of this county are interested in this action, it is ordered, on motion of the —, that E. F. be, and he hereby is, appointed to execute [*state the order or process,*] with the same powers therefor that the sheriff has by law in such cases. And it is ordered that the clerk direct said order [*or, process*] to the said E. F. for execution.

By section 4968, the appointment of a person to execute any process or order may be made for any good cause, other than the fact of the sheriff and coroner being interested parties. In such case, modify the above entry accordingly.

DIVISION II.—COMMENCEMENT OF ACTION—JURISDICTION— ISSUE.

CHAP. I. FORM OF ACTION.

III. PARTIES TO ACTION.

IV. JOINDER OF ACTIONS.

V. WHERE ACTION TO BE BROUGHT.

VI. JURISDICTION BY SUMMONS, PUBLICATION, OR APPEARANCE.

VII. PLEADINGS.

CHAPTER I.

FORM OF ACTION.

2. (Sec. 4973.) Order for trial by jury of a question of fact not put in issue by the pleadings.
3. Entry on return of verdict.
4. (Sec. 4973.) Order referring question to one or more persons.
2. (Sec. 4973.) *Order for trial by jury of a question of fact not put in issue by the pleadings.*

14.540. A. B.)
 v.)
 C. D.)

On motion of the ——— herein, and it appearing to the court that it is necessary to determine a question of fact in this case, not put in issue by the pleadings, it is ordered that the said question, to wit, whether [*here set forth distinctly and plainly the question to be tried*]:* be determined by the verdict of a jury, and that the case be set down for hearing on the ——— day of ——— 18—.¹ And all further directions are reserved until after the trial of said issue.

*Order sending issue to jury.*²

¹ This section, it will be noticed, does not say that the court may *impanel* a jury to try the question, as is provided in other cases, for instance in sections 5002 and 7240, and would seem to intend that the question should go to the regular petit jury. But *quere?*

² It is well for the clerk to annex to the journal entry a brief summary of the order or judgment, for his convenience in reading the minutes before the court, and in posting to the appearance docket. But, as it is not a part of the entry, it will hereafter be omitted in this work.

3. *Entry on return of verdict.*[*Title.*]

This day this cause came on to be heard on the question heretofore ordered to be determined by a jury, and thereupon came the following named persons as jurors, to wit:

1. L. S.,

7. R. M.,

etc.

etc.

Who were duly impaneled and sworn according to law.

And thereupon, after hearing the evidence, argument, and charge of the court, and after due deliberation, the said jury returned their verdict in writing, signed by their foreman, as follows, to wit:

“We, the jury, find upon the question submitted to us that, etc., [*state fact found*].

[Signed,]

L. S.,

*Foreman.*4. (Sec. 4973.) *Order referring question to one or more persons.*¹[*Title.*]

[*As in entry No. 2 to ❖ and continue:*] be referred to R. S. and R. F., with directions to report to this court without unnecessary delay.

CHAPTER III.

PARTIES TO ACTION.

REAL PARTY IN INTEREST—

5. Order substituting.

INFANT PARTIES—

6. (Sec. 4998.) Order substituting guardian for next friend.

TRUSTEE OF INSANE PERSON—

7. (Sec. 5000.) Order appointing.

8. (Sec. 5000.) Same—for party discovered to be, or becoming, insane.

9. (Sec. 5001.) Order removing trustee or guardian *ad litem*.

9a. (Sec. 5002.) Order for jury to try question of sanity of a party.

¹ For remarks and entries in cases analogous to this, see page 73 *Reference as before the code.*

GUARDIAN AD LITEM

- 10. (Sec. 5004) Appointed on minor's application
- 11. (Sec. 5004) Appointed on application of other than minor.

NEW PARTIES—

- 12. (Sec. 5006) Order making of person claiming interest, etc.
- 13. (Sec. 5006.) Order making party of one necessary to complete determination, etc.
- 14. (Sec. 5012) Husband made party
- 15. (Sec. 5012.) Upon disability of party action continued against representative.
- 16. (Sec. 5012) Substituting of party in case of transfer of interest
- 17. (Sec. 5013) Order making party of one necessary to controversy
- 18. (Sec. 5013) Dismissal for want of necessary party
- 19. (Sec. 5014) Order making in actions for the recovery of real or personal property.
- 20. (Sec. 5016) Third party claiming subject of action
- 21. (Sec. 5016) Order barring claim of third party
- 22. (Sec. 5016.) Order substituting third party for defendant
- 23. (Sec. 5018) Party in interest substituted for sheriff
- 24. (Sec. 5074) New party made on counterclaim

REAL PARTY IN INTEREST—

An action upon a promissory note which has been transferred by the payee can not be maintained in his name. It must be brought in the name of the "real party in interest." An amendment may be made by substituting the name of the real party in interest, and filing an amended petition in his name, upon payment of all costs, except for the issuing and service of process.¹

As to changing the title of a cause upon any change of parties, it was said by the Superior Court of Cincinnati¹ that, by section 116 of the code, which provides that, "the title of a cause shall not be changed in any of its stages," is meant that the title or caption of the answer or demurrer, or other paper filed in the cause after the petition, shall be like that of the petition—naming the plaintiff first; whereas, before the code, it was usual to name the party putting in the pleading first.

And that it does not conflict with section 137, which authorizes the court, in furtherance of justice, to amend any pleading, etc., by adding to or striking out the name of any party.

¹ *Ansonia Rubber Co. v. Wolf*, 1 Handy, 236.

² *Clawson v. Cone*, 2 Handy, 67; *Ansonia Rubber Co. v. Wolf*, 1 Handy, 236.

5. *Order substituting real party.*[*Title.*]

It appearing to the court that A. B., in whose name, as plaintiff, this action was brought, had, before its commencement, assigned all his interest in the subject-matter of the suit, and that E. F. is the real party in interest, it is, on motion of —, ordered that the said E. F. be, and he hereby is, substituted for the said A. B., as plaintiff herein, upon payment by said E. F. of all costs, except for the issuing and service of process.

And the said E. F. has leave to file an amended petition within — days.

INFANT PARTIES—

6. (Sec. 4998.) *Order substituting guardian for next friend.*[*Title.*]

Now comes E. F., the guardian of the plaintiff, A. B., who is a minor, and on his motion, and for good cause shown, it is ordered that the said E. F., guardian, be, and he hereby is, substituted for G. H., by whom, as next friend of the said A. B., this action was brought.

TRUSTEE OF INSANE PERSON—

7. (Sec. 5000.) *Order appointing.*[*Title.*]

It appearing to the court that the defendant in this case is manifestly an insane person, and that he has no legal guardian [*or*, that his legal guardian has an interest in this action adverse to said defendant], it is hereby ordered that C. M. be, and he hereby is, appointed trustee for said defendant in this suit, to appear and defend the same.

8. (Sec. 5000.) *Order appointing, for party discovered to be, or becoming, insane.*[*Title.*]

It appearing to the court that, since the commencement of this action, it has been discovered that the —, A. D., is manifestly an insane person [*or*, since the commencement of this action, the —, A. D., has become insane], and that he

has no legal guardian [*or*, that his legal guardian has an interest in this action adverse to said A. D.], it is ordered that C. M. be, and he hereby is, appointed trustee for said A. D., to appear and prosecute [*or*, defend] this action in his behalf.

9. (Sec. 5001.) *Order removing trustee or guardian ad litem.*

[*Title.*]

This cause being heard on the motion of —, for the removal of C. M., who was heretofore appointed trustee [*or*, guardian *ad litem*] for the —, A. D., in this case, and the court being satisfied from the evidence adduced that the said C. M. has failed to discharge his duty as such trustee [*or*, guardian *ad litem*], and that the best interests of the said A. D. require the removal of the said C. M., it is therefore ordered that said C. M. be, and he is hereby, removed from his relationship of trustee [*or*, guardian *ad litem*] as aforesaid. And L. W. is hereby appointed in the place of, and with all the powers and duties heretofore possessed by, the said C. M., as trustee [*or*, guardian *ad litem*] of the said A. D.

9a. (Sec. 5002.) *Order for jury to try question of sanity of a party.*

[*Title.*]

And now, it being represented in this case, that the defendant, C. D., is insane, and the fact being disputed by —, it is ordered by the court, on motion of —, that a jury be impaneled to try the question: and it is ordered that said jury be drawn from the jury-box,¹ and a venire issued as in other cases, returnable on the — day of —, 18—.

On return of venire, make entries similar to entries No. 97, *et seq.*

After entry on return of verdict finding sanity or insanity, modify entry No. 8.

GUARDIAN AD LITEM—

It must appear that the guardian *ad litem* had notice of his appoint-

¹ This section provides no special method of impaneling the jury, as does section 7240 of the criminal code, but this would probably be a proper, but not the only method of forming the jury.

ment, he must, at least, do something to signify his acceptance of the appointment.¹

He must be brought before the court by his voluntary act or by process.¹

10. (Sec. 5004.) *Appointed on minor's application.*

[*Title.*]

Now comes L. W., who is a minor of the age of fourteen years, and, having been served with process herein, makes application for a guardian *ad litem*; and thereupon it is ordered that G. H. be, and he hereby is, appointed guardian for the suit, for said minor defendant.

And now comes the said G. H., and in open court accepts said appointment.

11. (Sec. 5004.) *Appointed on application of other than minor.*

[*Title.*]

It appearing to the court that the defendant, H. A. W., is a minor,* under the age of fourteen years, and has been duly and legally served with summons herein [*or*, of the age of fourteen years, and has neglected, for twenty days from return of summons served upon him, to apply for a guardian *ad litem*], on motion of the plaintiff [*or*, E. F., a friend of said minor], G. H. is hereby appointed guardian for the suit, for said minor defendant.

And now comes the said G. H., and in open court accepts said appointment.

NEW PARTIES—

New parties may be made after a case has been taken by appeal to the District Court.²

For making new parties upon revivor of action; see *post*, section 5149.

12. (Sec. 5006.) *Order making—of person claiming interest, etc.*

[*Title.*]

It appearing to the court that N. P. claims an interest in the controversy herein adverse to the plaintiff, he is, on motion, hereby made a party defendant in this case.

¹St. Clair's Heirs v. Smith, 3 Ohio, 355. ²Babcock v. Camp, 12 Ohio St. 11.

13. (Sec. 5006.) *Order making party of one necessary to complete determination, etc.*

[*Title.*]

It appearing to the court that N. P. is a necessary party to a complete determination of the questions involved in this case, he is, on motion, hereby made a party defendant herein; and it is ordered that process issue for him.

14. (Sec. 5012.) *Husband made party.*

[*Title.*]

It appearing to the court that, since the commencement of this suit, the plaintiff, A. B., [*or*, defendant, C. D.], has intermarried with G. H.; on motion of — her present name of — is hereby substituted for her former name in this suit, and the said G. H. is hereby made a party plaintiff [*or*, defendant] with his said wife.

15. (Sec. 5012.) *Upon disability of party, action continued against representative.¹*

16. (Sec. 5012.) *Substitution of party in case of transfer of interest.*

[*Title.*]

Now comes N. P., by his attorney, and represents to the

¹It was said by the Supreme Court, in the case of *Babcock v. Camp, supra*, in regard to section 39 of the old code, which provided that, "in case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest," "the court has power under this section, in the exercise of a sound discretion, to allow the action to be prosecuted by or against the representative or successor in interest of a deceased party. For this purpose, supplemental pleadings may be allowed, and process served as in the commencement of an action. The court, in the exercise of this discretion, is governed by the equitable principle which requires reasonable diligence and good faith on the part of those invoking its action; and when the time has elapsed within which an action can be revived by a conditional order, as provided for in title 13, chapter 1, of the code, the application for leave to continue the suit by supplemental pleading may be granted or refused, according to the nature and circumstances of the case." In the revised statutes, the disabilities above named are provided for in separate sections: section 5149 provides for the case of death, and the section under consideration provides for "the disability" only. But, as every possible disability appears to be specially provided for by the code, no entry is given on this clause. If any is required modify entry No. 87.

court that the interest of the plaintiff [*or*, defendant] in the subject-matter of this action has been transferred to him during the pendency of the suit, and the court being satisfied thereof, the said N. P. is hereby substituted for the said plaintiff [*or*, defendant], and it is ordered that the action shall hereafter be carried on in his name.

17. (Sec. 5013.) *Order making party of one necessary to controversy.*

[*Title.*]

It appearing to the court that N. P. is a necessary party to the controversy in this case, for the reason that he holds a lien on the property in the petition described, similar to that held by the defendant, the said N. P. is therefore, on motion, made a party defendant hereto; and it is ordered that process issue for him.

18. (Sec. 5013.) *Dismissal for want of necessary party.*

[*Title.*]

See entry No. 215, post.

19. (Sec. 5014.) *Order making new party in actions for the recovery of real or personal property.*

[*Title.*]

Now comes N. P., by his attorney, and represents to the court that he has an interest in the property in the petition herein described, and, on his motion, he is hereby made a party defendant in this case.

20. (Sec. 5016.) *Third party claiming the subject of action.*

[*Title.*]

It appearing upon the affidavit of the defendant that N. P. has [*or*, makes] a claim to the subject of this action, and that he, the said defendant, is ready to pay [*or*, dispose of] the same as the court may direct, it is hereby ordered that said defendant pay over the money in his hands, to wit, the sum of \$——, [*or*, deposit the said property], so by the said N. P. claimed, to [*or*, with] the clerk of this court [*or other officer*], for the safe keeping thereof, until further order. And it is ordered that the said N. P. appear within —— days from the

service of this order, and maintain or relinquish his claim against the defendant: and in default thereof, that he be barred of all claim to said property.

A copy of this order being served upon N. P., if he fails to appear within the time limited, the court may make an order barring his claim, as follows:

21. (Sec. 5016.) *Order barring claim of third party.*

[*Title.*]

Now come the parties hereto, and it appearing to the court that the said N. P., who claimed the property, the subject of this action, has failed to appear within the time allowed by the court, to prosecute his said claim, although duly served with a copy of said order: now, therefore, it is considered and declared that the said N. P. be, and he hereby is, barred of all claim, in respect to the subject of this action, against the defendant herein.

But if N. P. appears, the court shall order:

22. (Sec. 5016.) *Order substituting third party for defendant.*

[*Title.*]

Now comes N. P., in compliance with the former order of this court, and represents that he is the owner of the property which is the subject of this action: and thereupon, on his motion, he is made defendant in this action in lieu of the said C. D. And the said C. D. is discharged from all liability to either of the parties in respect to the subject of this action, and it is now considered that he go hence without day, and recover from the — his costs herein expended.¹ And in all further proceedings herein, the name of the said N. P. shall be substituted as defendant in the action.

Section 5017 of the code makes the provisions of the last section applicable to actions brought against a sheriff, or other officer, for the recovery of property, or its proceeds, taken under execution. In such cases, the above entries should be modified to show the facts of the case.

¹This last order, discharging, etc., will be made when he has complied with the order of court to pay over or deposit the property.

23. (Sec. 5018, 80 O. L. 138.) *Party in interest substituted for Sheriff.*¹

[*Title.*]

It appearing to the court that the property in the petition described was taken by the defendant, under an execution [*or*, attachment] issued in favor of N. P.; now, on motion of said defendant and of the said N. P., it is ordered that the said N. P., upon his giving security for the costs, be, and he is hereby substituted as defendant in this action, and that the action thereafter proceed in his name as defendant.

24. (Sec. 5074.) *New party made on counterclaim.*

[*Title.*]

It appearing to the court that N. P. is a necessary party to a final decision upon the counterclaim filed herein, on motion, it is ordered that the — have leave to issue a summons accordingly for the said N. P. as such party.

So, also, a new party may be made, when necessary to a final decision upon a set-off, by section 5076 of the code.

CHAPTER IV.

JOINDER OF ACTIONS.

ELECTION—

25. Order to elect between two counts.

26. Order to elect between inconsistent claims.

27. Entry of election.

28. Entry of election, and exception.

28a. (Sec. 5021.) Judgment for money and decree for sale, etc.

ELECTION—

Where one cause of action is set forth in two counts, as at common law, the court may, on motion of the defendant, require the plaintiff to elect upon which count he will proceed.²

¹This order is within the discretion of the court. *Sifford v. Beatty*, 12 Ohio St. 189.

²*Sturges v. Burton*, 8 Ohio St. 215.

INCONSISTENT and INCONGRUOUS claims can not be joined in a petition. In such case, the plaintiff will be put to his election on which to proceed.¹

25. *Order to elect between two counts.*

[*Title.*]

On motion, and it appearing to the court that in the petition in this case there is but one cause of action set forth in two counts, it is hereby ordered that the plaintiff be required, within ten days, to elect upon which count he will proceed; and the other said count, it is hereby ordered, shall be stricken from the said petition.

26. *Order to elect between inconsistent claims.*

[*Title.*]

On motion, and it appearing to the court that inconsistent and incongruous claims are joined in the petition in this case, it is ordered that the plaintiff be required, within ten days, to elect upon which cause of action he will proceed; and that, as to the other of said causes, his petition be dismissed.

27. *Entry of election.*

[*Title.*]

Now comes the plaintiff, by his attorney, and, in compliance with the order of court heretofore made, elects to proceed upon the first of said counts [*or, causes*] in his petition, and dismisses his action as to the second.

If the plaintiff excepts to the order, the entry of election may be as follows:

28. *Entry of election, and exception.*

[*Title.*]

Now comes the plaintiff, by his attorney, and enters an exception to the order heretofore made within this term, requiring him to elect upon which count [*or, cause of action*] in his petition he will proceed. And, not waiving in any manner his exception, the said plaintiff elects to proceed

¹ Insurance Co. v. Vattier, 1 Handy, 217.

upon the first of said counts [*or, causes*], and dismisses his action as to the second.

28a. (Sec. 5021.) *Judgment for money, and decree for sale of mortgaged premises.*

[*Title.*]

See entry No. 216, et seq.

CHAPTER V.

WHERE ACTION TO BE BROUGHT.

29. (Sec. 5032.) Order for change of venue.

30. (Sec. 5033.) Order, in case of corporations.

31. (Sec. 5034.) Staying proceedings against member of general assembly.

29. (Sec. 5032.) *Order for change of venue.*

[*Title.*]

On motion of —, and the court being satisfied¹ that a fair and impartial trial of this cause can not be had in this county, it is ordered* that the place of trial be, and the same hereby is, changed to the county of —.

It is therefore directed that the clerk of this court transmit to the clerk of the Court of Common Pleas of said county of — the pleadings and papers in this cause, with a certified copy of this order.

30. (Sec. 5033.) *Order, in case of corporations.*

[*Title.*]

On motion of plaintiff [*or, defendant*], and it appearing to the court that the defendant [*or, plaintiff*] herein is a corporation having more than fifty stockholders, and the plaintiff [*or, defendant*] having made application according to statute for a change of venue, it is ordered, *etc, as from * in last.*

31. (Sec. 5034.) *Staying proceedings against member of the general assembly.*

[*Title.*]

On motion of —, and it appearing to the court that the

¹ Bank of Cleveland v. Ward, 11 Ohio, 128, 130.

defendant is a member [*or*, officer] of the senate [*or*, house of representatives] of this state, it is therefore ordered that all further proceedings in this action against the said C. D. be stayed during the present session of the said senate [*or*, house of representatives], and for — days thereafter.

CHAPTER VI.

JURISDICTION BY SUMMONS, PUBLICATION, OR APPEARANCE.

SUBDIVISION I. ACTUAL SERVICE.

II. CONSTRUCTIVE SERVICE.

SUBDIVISION I.—ACTUAL SERVICE.

When the sheriff returns a summons served, and the defendant wishes to call in question the regularity of such service, he may enter his appearance “for that purpose only,” and move to set aside or amend the return of the sheriff, or set aside the service. The order of the court may be expressed by a simple granting or overruling of the motion, or by an order setting aside or amending the service and return.

32. *Order setting aside service.*

[*Title.*]

On motion of defendant, and it being made to appear that the service of summons herein was irregular, the said service and the sheriff's return thereof are hereby set aside and held for naught.

SUBDIVISION II.—CONSTRUCTIVE SERVICE.

33. *Order approving publication.*

UNKNOWN HEIRS—

34. (Sec. 5053.) *Order for publication against.*

35. *Order approving publication.*

There is no provision of the code requiring the court to approve of the publication of notice independent of the final action of the court in rendering judgment predicated on the publication; but this is a convenient practice in view of the possible loss of the papers.¹ Publication should not be approved unless there has been a strict and literal compliance with the law.²

33. *Order approving publication.*

[*Title.*]

Now comes the plaintiff, by his attorney, and offers proof of publication of the pendency and prayer of the petition herein; and the court finding said publication and proof in all respects regular and according to law,* do hereby approve the same.

UNKNOWN HEIRS—

34. (Sec. 5053.) *Order for publication against.*

[*Title.*]

On motion of the said A. B., by his attorney, and it appearing from the affidavit of the said A. B. that the names and residences of the heirs of the said L. M., are unknown to the said plaintiff, it is ordered that, as to them, service be made by publication for six consecutive weeks, in manner prescribed by statute in case of non-resident defendants.

35. *Order approving publication against unknown heirs.*

[*Title.*]

*As in No. 33 to *, and continue:]*—and the former order of this court,³ do hereby approve the same.

¹ Vallette v. Ky. Trust Co. Bank, Gen. Term, 1855, 2 H. 1.

² Lawler v. Whetts, 1854, 1 H. 39.

³ The order of court must be substantially complied with, and a finding by the court "that publication has been made according to law" only, is not conclusive upon bill of review. Trimble et al. v. Longworth, 13 Ohio St. 431.

CHAPTER VII.

PLEADINGS.

SUBDIVISION II. PETITION.

III. DEMURRER.

IV. ANSWER AND CROSS-PETITION.

VI. GENERAL RULES.

VII. MISTAKES AND AMENDMENTS.

SUBDIVISION II. PETITION.

When the petition states several causes of action in one count, without separately stating or numbering them, the court may, by an order, require that the plaintiff shall separately state and number each of them. And if the plaintiff fail to comply with such order, the court may then dismiss the plaintiff's action.¹

36. *Order to separately state and number causes, etc.*
[Title.]

On motion, and good cause shown, it is ordered that the plaintiff herein amend his petition by separately stating and numbering the different causes of action therein set forth; and ten days are allowed therefor.

SUBDIVISION III.—DEMURRER.

37. (Sec. 5065.) Demurrer to petition sustained, and several petitions allowed.
38. (Sec. 5116.) Demurrer to petition sustained, with leave to amend.
39. Demurrer to petition sustained, and judgment for defendant.
40. (Sec. 5113.) Demurrer to petition overruled, with leave to answer.
41. Demurrer to petition overruled, and judgment for plaintiff.
42. (Sec. 5116.) Demurrer to answer sustained, with leave to amend.
43. Demurrer to answer sustained, and judgment for plaintiff.
44. (Sec. 5113.) Demurrer to answer overruled, with leave to reply.

¹ Board of Comm'rs of Jackson Co. v. Hoaglin, 5 Kan. 558. See Code, section 5061.

An order enlarging the time to answer has been held in New York an extension of time to demur.¹

When plaintiff's petition has been adjudged insufficient upon demurrer, and no leave to amend been asked for, it is not error to proceed to final judgment against the plaintiff, without granting leave to amend.²

When a demurrer to the petition is overruled, the plaintiff may proceed to a decree, taking the petition as confessed, or the defendant may be permitted to answer.³

37 (Sec. 5065.) *Demurrer to petition sustained, and several petitions allowed.*

[*Title.*]

This cause being heard on the demurrer to the petition, the court, on consideration, finds the same well taken in this, that in said petition there is misjoinder of several causes of action, and does therefore sustain the said demurrer.

And on motion of the plaintiff, he is allowed [upon payment of the costs herein to the present time],⁴ to file within — days an amended petition in this case, and also to file other several petitions, upon each of which a case shall be docketed and proceeded in without further service. Said amended petition, and other several petitions, each, to contain such of said original causes of action as may be properly joined in one action. [*Or, the court may order what causes may be set forth in each petition.*]

38. (Sec. 5116.) *Demurrer to petition sustained, with leave to amend.*⁵

[*Title.*]

This cause being heard on the demurrer to the petition, the court, on consideration, sustains the same; and the plaintiff is allowed to amend his petition within — days.

¹ Broadhead v. Broadhead, 4 How. 308.

² Devoss v. Gray, 22 Ohio St. 159.

³ Baldwin v. Creed, Wright, 729; sec. 5113.

⁴ Discretionary with the court.

⁵ An amendment can not be made by mutilating or altering the files. Hill v. Superintendent, etc., 10 Ohio St. 261. A new pleading or amendment of pleading must be filed.

39. *Demurrer to petition sustained, and judgment for defendant.*
[Title.]

This cause being heard on the demurrer to the petition, the court, on consideration thereof, sustain the same.

And thereupon, the plaintiff failing [*or*, not asking] to plead further, it is considered by the court that the defendant go hence without day, and recover from the plaintiff his costs herein expended.¹

40. (Sec. 5113.) *Demurrer to petition overruled, with leave to answer.*

[Title.]

This cause being heard on the demurrer to the petition, the court, on consideration, overrules the same; and, on motion, the defendant is allowed to answer within — days.

41. *Demurrer to petition overruled, and judgment for plaintiff.*
[Title.]

This cause being heard on the demurrer to the petition, the court, on consideration thereof, overrule the same. And thereupon, the defendant failing [*or*, not asking] to plead further, the court finds upon the petition [and evidence] that the said defendant is indebted to plaintiff in the sum of — dollars.

It is therefore considered by the court that the plaintiff recover from the defendant the said sum of \$——, so found due, together with his costs herein expended.¹

42. (Sec. 5116.) *Demurrer to answer sustained, with leave to amend.*²

[Title.]

This cause being heard on the demurrer to the answer, the court, on consideration, sustains the same, and the defendant is allowed to amend his answer within — days.

¹ As to awarding executions, see *post*, page 152.

² See note 5 on preceding page.

43. *Demurrer to answer sustained and judgment for plaintiff.*

[Title.]

This cause being heard on the demurrer to the answer, the court, on consideration thereof, sustains the same. [*Conclude as from * in entry No. 41, substituting “pleadings” for “petition.”*]

44. (Sec. 5113.) *Demurrer to answer overruled, with leave to reply.*

[Title.]

This cause being heard on the demurrer to the answer, the court, on consideration thereof, overrules the same, and the plaintiff is allowed to file a reply within — days.

SUBDIVISION IV.—ANSWER AND CROSS-PETITION.

45. (Sec. 5074.) *New party made on counterclaim.*46. (Sec. 5074.) *Counterclaim made the subject of a separate action.*45. (Sec. 5074.) *New party made on counterclaim.*

[See entry number 24.]

46. (Sec. 5074.) *Counterclaim made the subject of a separate action.*

[Title.]

It appearing to the court that E. F. is a necessary party to a final decision upon the counterclaim set up in the answer herein, on motion, it is ordered that the said counterclaim be stricken out of the answer, and made the subject of a separate action. And — days are allowed for an amended answer in this case.

SUBDIVISION VI.—GENERAL RULES OF PLEADING.

47. (Sec. 5084.) *Substituting pleading.*48. (Sec. 5087.) *Order to strike out redundant matter, etc.*49. (Sec. 5088.) *Order to make definite and certain.*50. (Sec. 5089.) *Withdrawing counterclaim and making separate action*51. (Sec. 5098.) *Time for answer extended.*52. *Pleading filed by leave.*53. *Pleading received.*

- 54. (Sec. 5101.) Nonsuit ordered unless interrogatories answered.
- 55. (Sec. 5101.) Judgment ordered unless interrogatories answered
- 56. (Sec. 5101.) Judgment as by default entered
- 57. Amending defective certificate.

In New York, it has been held that enlarging the time to answer is an extension of time to demur,¹ and upon reasons equally applicable to the code of Ohio.

When, in amending pleadings, an allegation is required to be stricken from, or added to, a petition, it can not be done by mutilating or altering the files. The party amending should either file a new pleading or file a statement of the amendment, and designate, by reference, where the new matter is to be inserted, or what is to be considered as stricken out.²

A pleading may, on motion, be stricken from the files for want of verification. When such has been done, in case of a petition, and the defect supplied, a new service must be made.³

47. (Sec. 5084.) *Substituting pleadings.*

[*Title.*]

It appearing that the pleadings [*or any of them*] in this case have been lost, or are withheld from the files of the court, on motion, it is ordered that the — be allowed to substitute copies thereof; and that the same be in all respects received instead of such original pleadings.⁴

48. (Sec. 5087.) *Order to strike out redundant matter, etc.*

[*Title.*]

This cause coming on to be heard upon the motion to strike out from the petition certain redundant [*or, irrelevant*] matter, the court, on consideration, grant the same in part, and order that all the words contained in said petition from, and including, the word "And" in the third line of the second page to, and including the word "defendant," in the fifth line of the third page, be stricken out therefrom: and as to

¹ *Broadhead v. Broadhead*, 4 Howard, 308.

² *Hill v. Superintendent of Road District, etc.*, 10 Ohio St. 261.

³ *Stevens v. White*, Com. Pl. Gallia, 1 W. L. M. 394.

⁴ See *Hollister et al v. The Judges, etc.*, 8 Ohio St. 201. For entry and proceedings under this section when pleadings and papers have been destroyed by fire or civil commotion, see appendix, p. 504d.

the matter contained in the second paragraph, the motion is overruled.

49. (Sec. 5088.) *Order to make definite and certain.*

[*Title.*]

This cause being heard on the motion to require the plaintiff to make his petition more definite and certain, the court, on consideration, grant said motion, and allow ten days for making said amendment.

50. (Sec. 5089.) *Withdrawing counterclaim and making separate action.*

[*Title.*]

Now comes the defendant herein, and, by leave of court, withdraws his counterclaim [*or, set-off*] set up in his answer. And, on motion, the said defendant is allowed forthwith to file his petition, and docket in this court a separate action on the subject-matter of the said counterclaim [*or, set-off*], and proceed in the same without service of process; all subsequent pleadings to be filed, and proceedings to be had, as in other like cases in this court after process served.

51. (Sec. 5098.) *Time for answer extended.*

[*Title.*]

On motion, time for answering herein is extended ten days.

52. *Pleading filed by leave.*

[*Title.*]

Now comes the defendant, and, by leave of court, files his answer herein.

53. *Pleading received.*

[*Title.*]

The answer heretofore filed herein is now received by court.

54. (Sec. 5101.) *Nonsuit ordered unless interrogatories answered.*

[*Title.*]

On motion of the defendant, and it appearing to the court that the plaintiff has refused [*or, neglected*] to answer the interrogatories annexed to the answer herein, within the time required by law, it is now ordered that unless answer thereto be filed in this court within — days, that then this action stand dismissed at the cost of the plaintiff.

55. (Sec. 5101.) *Judgment ordered unless interrogatories answered.*

[*Title.*]

On motion of the plaintiff, and it appearing to the court that the defendant has refused [*or, neglected*] to answer the interrogatories annexed to the petition herein, within the time required by law, it is now ordered that unless answer thereto be filed in this court within — days, this case stand as in case of failure to answer, and plaintiff be allowed judgment upon his claim as by default.

56. (Sec. 5101.) *Judgment as by default entered, at expiration of time allowed, etc.*

[*Title.*]

And now the defendant herein being still in default for answer to the interrogatories annexed to the petition, although the time allowed therefor by the court has expired, the court find upon the petition and evidence, and the default of the defendant, that said defendant is indebted to plaintiff in the sum of \$——.

It is therefore considered by the court that the plaintiff recover from the defendant, C. D., the said sum of \$——, and his costs herein expended.

For forms of proceeding to enforce answer to interrogatories by attachment, see Contempts of Court.

57. *Amending defective certificate.*¹

[Title.]

On motion of the plaintiff, and it appearing that the verification of the petition herein is defective, only in the official certificate of the notary taking the same, it is hereby ordered that the same may be amended; which being done, no new summons on account of said amendment need be issued.

SUBDIVISION VII.—MISTAKES AND AMENDMENTS.

AMENDMENT OF PLEADINGS AND PROCESS—

- 58. (Sec. 5113.) Demurrer overruled, with leave to plead.
- 59. (Sec. 5114.) Order adding name to process.
- 60. (Sec. 5114.) Order striking name from pleadings.
- 61. (Sec. 5114.) Order correcting name of party.
- 62. (Sec. 5114.) Leave to amend formal error.
- 63. (Sec. 5116.) Demurrer sustained, with leave to amend.
- 64. (Sec. 5118.) Order substituting real for fictitious name.

SUPPLEMENTAL PLEADINGS—

- 65. (Sec. 5119.) Leave to file.

CONSOLIDATION OF ACTIONS—

- 66. (Sec. 5120.) Order, in the case continued.
- 67. (Sec. 5120.) Order, in the case discontinued.
- 68. Order that several suits abide the result of one.

AMENDMENT OF PLEADINGS AND PROCESS—

When an amendment is ordered to be made to a pleading by adding, or striking out, an allegation, the practice of changing, interlining, or mutilating the original paper is not favored.^{2 3} Either a new pleading should be filed, or a statement of the amendment made and filed, designating by reference where the new matter is to be added or stricken out, or the journal entry making the amendment may make such designation. But if alteration of the original paper is made with the permission of the court, and no prejudice results to the adverse party, the final judgment will not be reversed therefor.³

¹ Where the official certificate of a verification to a petition is defective, the defect may be cured by amendment. *Stevens v. White*, Com. Pl. Gallia, 1 W. L. M. 394.

² *Hill v. Supt.*, etc., 10 Ohio St. 261.

³ *Schneider v. Hcosier*, 22 Ohio St. 98.

The name of any party may be stricken from a pleading and another substituted in all future proceedings, without being objectionable as an amendment that changes substantially the original claim, or as conflicting with section 116 (see 5058 Rev. Stat.) of the code.¹

When an order requires a party to amend, and directs him to pay costs, payment of the costs is not a condition precedent to the amendment unless so expressed.²

A summons may be amended, but without an appearance the amended summons must be served on the defendant.³

58. (Sec. 5113.) *Demurrer overruled, with leave to plead.*

[*Title.*]

See entries Nos. 40 and 44.

59. (Sec. 5114.) *Order adding name to process.*

[*Title.*]

On motion, and it appearing that in the order of injunction herein issued the name of G. H., one of the defendants, was inadvertently omitted, it is hereby ordered that said process be so amended as to include the name of the said G. H., and that in all things he be subject to the same order and process as the other parties therein named.

60. (Sec. 5114.) *Order striking name from pleadings.*

[*Title.*]

On motion, and it appearing that in the petition G. H. is named as one of the parties plaintiff, and that the same is an inadvertence, the said G. H. having no interest in the said case, it is ordered that the name of the said G. H. be, and hereby is, stricken out of said petition, and all subsequent pleadings and process.

61. (Sec. 5114.) *Order correcting name of party.*

[*Title.*]

On motion, and it appearing that the defendant, Johnson L., has been sued in this action by the name of John L., through

¹Ansonia Rubber Co. v. Wolf, 1 Handy, 236.

²Sturtevant v. Fairman, 4 Sandf. 674.

³Williams v. Hamlin, 1 Handy, 95. See also 1 Handy, 574.

inadvertence, and that the said defendant has been personally served with summons, it is ordered that said mistake be corrected, and that this entry operate as an amendment to the petition and summons; and that the true name of the defendant be used in all further proceedings herein.

62. (Sec. 5114.) *Leave to amend formal error.*

[*Title.*]

On motion, it is ordered that the plaintiff have leave to amend his petition on file in this action by inserting [*or, canceling the words* [*designate the error*] after the word — on the — page of said petition; and this entry shall be considered as effecting said amendment.

63. (Sec. 5116.) *Demurrer sustained, with leave to amend.*

[*Title.*]

See entries Nos. 38 and 42.

64. (Sec. 5118.) *Order substituting real for fictitious name.*

[*Title.*]

It appearing to the court that summons in this action has been served personally upon the defendant under the name of J. K., and that, since the issuing thereof, the true name of the said defendant is discovered to be J. H., on motion, it is ordered that the petition herein be, and the same hereby is, amended by substituting the name of J. H. in the place of J. K.

SUPPLEMENTAL PLEADINGS—

65. (Sec. 5119.) *Leave to file.*

[*Title.*]

On motion [and notice having been given to the adverse party], the — herein now, by leave of court, files a supplemental — in this case.

CONSOLIDATION OF ACTIONS—

(The practice is for defendant to file motions with the clerk for consolidation, and if the plaintiff fails to resist or show good cause to the contrary, the defendant is entitled on call of the motion docket to his or

der. A separate motion and journal entry should be made in each case, that the record of each case may be complete.¹

66. (Sec. 5120.) *Order in the case continued.*

[*Title.*]

On motion of the defendant, and for good cause shown, it is ordered that this case and case numbered —, in this court [between the same parties], be, and they are hereby consolidated; and that all further proceedings in said consolidated action be had in, and under the number of,* this action.

67. (Sec. 5120.) *Order in the case discontinued.*

[*Title.*]

As in the last to, and continue;]*—case — aforesaid; [and that the defendant recover from the plaintiff his costs in this action expended.]

68. *Order that several suits abide the result of one of them.*²

[*Title.*]

[*Title.*]

[*Title.*]

On motion of the —, and due consideration thereof being had, it is ordered that all of the above-named causes abide the event and final determination of the one which the — may elect to have tried; and that whatever judgment may finally be rendered in the cause so tried, shall be entered in each of the other causes. And the party prevailing shall be at liberty to enter judgment accordingly.

SUBDIVISION VIII.—MOTIONS.

69. Motion filed by leave.

70. (Sec. 5126.) Motion filed and notice ordered.

71. Motion granted or overruled.

It is not customary to apply to the court for leave to file a motion.

¹ See on this subject *Howlett v. Martin*, 3 Law Gazette, 266.

² See *Jackson v. Swartevont*, 5 Cow. 283. See also *Blake v. R. R. Co.*, 17 How. Pr. 228.

before the party desiring to file it is in default, except in cases where the statute specially requires it. But where the party is in default he of course has no right to file a motion without leave; and in cases where notice is required which the court may by order dispense with, the motion should be filed by leave.

69. *Motion filed by leave.*

[*Title.*]

Now comes the — herein, and by leave of court files his motion to [*state object of motion.*]

70. (Sec. 5126.) *Motion filed and notice ordered.*

[*Title.*]

Now comes the — herein, and by leave of court files his motion to strike [*any pleading or paper*] from the files. And the court orders that notice thereof be given to the — according to law.

71. *Motion granted or overruled.*

[*Title.*]

This cause now coming on for hearing, on the motion of the — to [*state object*], the court, on consideration thereof, grants [*or, overrules*] the same.

DIVISION III.—TRIAL.

CHAP. I. PROVISIONS PRELIMINARY.

II. CONDUCT OF THE TRIAL.

III. EVIDENCE.

IV. EXCEPTIONS.

V. NEW TRIAL.

CHAPTER I.

PROVISIONS PRELIMINARY.

SUBDIVISION III. TENDER AND OFFER TO CONFESS JUDGMENT.

IV. REVIVOR OF ACTIONS.

SUBDIVISION III.—TENDER AND OFFER TO CONFESS JUDGMENT.

I. TENDER ON CONTRACT FOR PAYMENT OF MONEY—

72. (Sec. 5137.) Judgment for money after tender made before suit.

11. TENDER ON CONTRACT FOR PAYMENT OF OTHER ARTICLE THAN MONEY—TRIAL BY THE COURT—

- 73. (Sec. 5138.) Judgment after tender proved, for assessed value.
- 74. (Sec. 5138.) Judgment after tender proved, allowing defendant to perform contract.
- 75. (Sec. 5138.) Judgment for plaintiff when tender not sufficient.

111. TENDER ON CONTRACT FOR PAYMENT OF OTHER ARTICLE THAN MONEY—TRIAL BY JURY—

- 76. (Sec. 5138.) Verdict of jury after tender proved, assessing value.
- 77. (Sec. 5138.) Judgment on verdict for assessed value of property or labor.
- 78. (Sec. 5138.) Judgment on verdict when defendant offers to perform contract.
- 79. (Sec. 5138.) Verdict of jury finding tender insufficient.
- 80. (Sec. 5138.) Judgment on last verdict.

IV. OFFER TO CONFESS JUDGMENT—

- 81. (Sec. 5139.) Judgment after offer to confess before suit.
- 82. (Sec. 5140.) Judgment on offer to allow, and acceptance.
- 83. (Sec. 5140.) Judgment after offer rejected.
- 84. (Sec. 5141.) Judgment after offer to confess part.

I. TENDER ON CONTRACT FOR PAYMENT OF MONEY—

- 72. (Sec. 5137.) *Judgment after tender made before suit.*
[Title.]

Enter judgment in the regular form, except for costs, and add:]
The court further find that the defendant, as set up in his answer herein, tendered to said plaintiff the said sum of \$——, here found to be due him, before the commencement of this action, and also paid in the same to the clerk of this court before the trial.

It is therefore considered by the court that the plaintiff pay all the costs of this action, and that the clerk, out of the money in his hands, as aforesaid, apply first the sum of \$—— to the payment in full of the costs herein, and pay over the balance, to wit, the sum of \$——, to the plaintiff, in full of the judgment here rendered.

II. TENDER ON CONTRACT FOR PAYMENT OF OTHER ARTICLE THAN MONEY—TRIAL BY THE COURT—

73. (Sec. 5138.) *Judgment after tender proved, for assessed value.*

[*Title.*]

This cause coming on now for hearing, upon the pleadings and evidence, was submitted to the court without the intervention of a jury, on consideration whereof, the court finds that the defendant did, as set up in his answer, tender to the plaintiff, on the — day of —, 18—,* the property [*or, labor*] therein described, and that the same was in full performance of the terms of the contract set up in plaintiff's petition; and does now assess the value of said property [*or, labor*] so tendered at \$—, which the court finds to be due to this plaintiff.

It is therefore considered by the court that the plaintiff recover from the defendant the said sum of \$—, but without interest or costs of suit.

74. (Sec. 5138.) *Judgment after tender proved, allowing defendant to perform contract.*

[*Title.*]

This cause coming on now for hearing upon the pleadings and evidence, was submitted to the court without the intervention of a jury, on consideration whereof, the court finds that the defendant did, as alleged in his answer, tender to the plaintiff, on the — day of —, 18—, full performance of the terms of the contract set up in the petition; and the defendant now offering to perform the same forthwith, it is therefore considered by the court that, upon said defendant delivering to plaintiff [*specify the property, or, if it is labor to be done, make the statement accordingly*] within — days, the said defendant go hence without day, and recover from the plaintiff his costs herein expended.

75. (Sec. 5138.) *Judgment for plaintiff when tender not sufficient.*

[*Title.*]

As in No. 73 to *, and continue:—certain property [*or, labor*], in performance of the contract set up in the petition, but

the court finds that said tender was not in accordance with the terms of said contract, and was not a performance of the same. The court further finds that the plaintiff and defendant entered into the contract set forth in the petition, and that, by the defendant failing to perform the same, the plaintiff has been damaged in the sum of \$——.

It is therefore considered by the court that the plaintiff recover from the defendant the said sum of —— dollars, his damages so assessed, and his costs herein expended.

III. TENDER ON CONTRACT FOR PAYMENT OF OTHER ARTICLE THAN MONEY—TRIAL BY JURY—

76. (Sec. 5138.) *Verdict of jury after tender proved, assessing value.*

[*Title.*]

Use regular jury forms, page 55, and let the verdict be:— We, the jury, find that the defendant did, as set up in his answer, tender to the plaintiff, on the —— day of ——, 18—, the property [*or, labor*] therein alleged, and that the same was a full performance of the contract set up in the petition; and we do assess the value of the said property [*or, labor*] so tendered at —— dollars."

77. (Sec. 5138.) *Judgment on last verdict for assessed value of property or labor.*

[*Title.*]

The jury in this action having, at a former day of this court, assessed the value of the property [*or, labor*] tendered by the defendant, in performance of his contract with plaintiff, at \$——, it is therefore now considered by the court that the plaintiff recover from the defendant the said sum of \$——, but without interest or costs of suit.

78. (Sec. 5138.) *Judgment on last verdict when defendant offers to perform contract.*

[*Title.*]

The jury in this action having at a former day of this court found that the defendant made a tender to plaintiff in full performance of the contract between them, and the de-

defendant now offering to perform the same forthwith, it is ordered and adjudged that upon said defendant delivering to plaintiff [*specify property; or, if it is labor to be performed, make statement accordingly*], within —— days, the said defendant go hence without day and recover from the plaintiff his costs herein expended.

79. (Sec. 5138.) *Verdict of jury finding tender insufficient.*

[*Title.*]

Use regular jury forms, page 55, and let the verdict be:]

“We, the jury, find that the defendant did not tender to plaintiff full performance of the contract set up in the petition; and we do assess the damages of the plaintiff by reason of the premises at —— dollars.”

80. (Sec. 5138.) *Judgment on last verdict,*

[*Title.*]

May be same as Entry No. 249.

IV. OFFER TO CONFESS JUDGMENT—

81. (Sec. 5139.) *Judgment after offer to confess before suit.¹*

[*Title.*]

Append to the usual judgment entry, omitting costs, the following:]

And the amount here recovered by the plaintiff not being more than the said defendant has heretofore in open court, before the bringing of this suit, and after notice given to the plaintiff, to wit, on the —— day ——, 18——, offered to confess, it is ordered that the said plaintiff pay the costs of this action.

82. (Sec. 5140.) *Judgment on offer to allow, etc., and acceptance.*

[*Title.*]

Now came the parties hereto, by their attorneys, and the defendant having served upon the plaintiff [*or his attorney*] an offer in writing to allow judgment to be taken against him

¹ See note to Entry No. 84.

for the sum of — dollars, and the plaintiff having accepted such offer and given notice thereof in writing to the defendant [*or his attorney*], within five days after the service of such offer:

It is now therefore considered that the plaintiff, A. B., recover from the said C. D. the said sum of \$—, and his costs herein expended.

83. (Sec. 5140.) *Judgment after offer to allow, etc., rejected.*

[*Title.*]

Append to the usual judgment entry, omitting costs, the following:

And the amount here recovered by the plaintiff not being more than the said defendant heretofore in writing offered to allow judgment to be taken for, it is ordered that the plaintiff recover only his costs herein expended before the said offer, and that he pay all costs thereafter made in the case.

84. (Sec. 5141.) *Judgment after offer to confess part.¹*

[*Title.*]

Append to the usual judgment entry, omitting costs, the following:

And the amount here recovered by the plaintiff not being more than the said defendant has heretofore in open court, to wit, on the — day of —, 18—, offered to confess, it is ordered that the plaintiff only recover his costs herein expended before the said offer, and that he pay all costs thereafter made in the case.

SUBDIVISION IV.—REVIVOR OF ACTIONS.

85. (Sec. 5144.) *Judgment of abatement.*

86. (Secs. 5146 and 5147.) *Suggestion of the death of one of several parties.*

¹ The offer in court to confess judgment for part of the amount claimed," etc., which section 498 (5141) of the code authorizes the defendant to make in an action for the recovery of money, must, to be effectual, be made in *open court*. Therefore, it is not sufficient for a defendant, who wishes to make such offer, to merely place a written offer on file with the papers in the case, although the plaintiff may have notice that such offer has been so made. *Fike v. France*, 12 Ohio St. 624.

- 87. (Sec. 5149.) Representative made party, and action revived.
- 88. (Sec. 5150.) Conditional order of revivor, on the death of the plaintiff.
- 89. (Sec. 5150.) Same, on the death of the defendant.
- 90. (Sec. 5152.) Final order of revivor.
- 91. (Sec. 5152.) Order of revivor, by consent.
- 92. (Sec. 5159.) Case stricken from docket, when not revived.
- 93. (Sec. 5160.) Same, after notice given.

When the revivor is not by consent, a conditional order must first be made,¹ and served upon the adverse party in the same manner, and returned within the same time as a summons; and if no cause be shown to the contrary, the final order of revivor is made.²

Section 411 [5158] of the code does not conflict with this view; that section is simply a limitation of the time within which the order must, and after which it can not be made.³

If the order is made by consent of parties, the action forthwith stands revived.²

Where one of the defendants, in an action on a joint contract, dies before judgment, and the judgment is taken against all the defendants, without any suggestion of his death, or making his representatives parties, such judgment is not void, but merely voidable.⁴

The right to revive an action, under title 13, chapter 1, of the code, is not dependent on the discretion of the court, or of the judge making the order, but, under the conditions and within the time therein limited, is a matter of right.⁵

85. (Sec. 5144.) *Judgment of abatement.*

[*Title.*]

Suggestion of the defendant's death being made to the court, and the court being satisfied of the truth thereof, this action now abates.

86. (Sees. 5146 and 5147.) *Suggestion of the death of one of several parties.*

[*Title.*]

Now comes —, and suggests to the court the death of

¹ Code, sec. 5150.

² Code, sec. 5152.

³ *Hamilton v. Sals*, Lawrence District Court, 1859, 1 W. L. M. 403.

⁴ *Swasey & Co. v. Antram & Co.*, 24 Ohio St. 87.

⁵ *Carter v. Jennings*, 24 Ohio St. 182.

R. S., one of the parties plaintiff [*or*, defendant] herein, and the action proceeds.

87. (Sec. 5149.) *Representative made party, and action revived.*
[*Title.*]

Now comes E. F., and suggests to the court the death of A. B., the plaintiff [*or*, of C. D., the defendant] herein, and that he is the duly appointed and qualified administrator [*or other representative*] of the said —, and moves the court for leave to become a party to this action, and to continue the same. And the court, finding the suggestion to be true, grants said motion; and said E. F., administrator, etc., is accordingly made party plaintiff [*or*, defendant] in this action, and the action proceeds.

If the revivor be by supplemental pleading, as provided in section 5149, the only journal entry necessary is one allowing the supplemental pleading, for which see Entry No. 65.

88. (Sec. 5150.) *Conditional order of revivor on the death of the plaintiff.*

[*Title.*]

Now comes R. W. [*or*, comes the defendant],¹ and suggests to the court that the plaintiff herein has died since the commencement of this action, and that he [*or*, that R. W.] has been duly appointed and qualified as executor of the last will and testament [*or name other capacity of representative or successor, as provided for in section 5154*] of the said plaintiff. And the court being fully satisfied thereof, it is now, on motion of the said —, ordered that this action be revived, and proceed in the name of the said R. W., executor [*or other representative or successor*], as aforesaid, unless, within² — days after the service of this order upon said [*adverse party*] sufficient cause be shown against said revivor.³

¹ See sec. 5151.

³ See sec. 5152.

² See note 1, page 148 for filling this blank.

89. (Sec. 5150.) *Conditional order of revivor on the death of the defendant.*

[Title.]

Now comes R. B. [*or, comes the plaintiff*], and suggests to the court that the defendant herein has died since the commencement of this action, and that he [*or, that R. W.*] has been duly appointed and qualified as executor of the last will and testament [*or name other representative or successor, as provided for in section 5156*] of the defendant. And the court being fully satisfied thereof, it is now, on motion of the said —, ordered that this action be revived in the name of R. B. as such executor [*or other representative*], and proceed against him, unless within —¹ days after the service of this order upon the said R. B., sufficient cause be shown against such revivor.

90. (Sec. 5152.) *Final order of revivor.*

[Title.]

Now comes the said —, and the conditional order of revivor herein having been duly served upon the said —, and no [*or, no sufficient*] cause being shown against said revivor, it is hereby ordered that this action stand revived in the name of R. W., executor [*or other representative*], as aforesaid, and proceed in his favor [*or, against him*].

91. (Sec. 5152.) *Order of revivor by consent.*

[Title.]

Now comes —, and suggests to the court that the — has died since the commencement of this action, and that L. S. has been duly appointed and qualified as executor of the last will and testament of the said —. And the court being fully satisfied thereof, and all parties consenting, it is hereby, on motion of the said —, ordered that this action stand revived in the name of L. S., as said executor, and proceed in his favor [*or, against him*].

The publication provided for in section 5153 should be approved by an order of court, as in the case of Constructive Service of Summons, Entry No. 33.

¹ See note 1, page 148,

92. (Sec. 5159.) *Case stricken from docket—when not revived.*

[*Title.*]

It appearing to the court that the — herein has been dead for more than one year, and that the case has not been revived by [*or, against*] his representatives or successor, it is now, on motion of —, ordered that the case be stricken from the docket.

93. (Sec. 5160.) *Same, after notice given.*

[*Title.*]

It appearing that the plaintiff herein died at a former term of this court, and that ten days' notice of this application has been given to S. H., the executor of the said plaintiff, and that said executor has failed to revive this action, it is now, on motion of the defendant, ordered that the action be stricken from the docket: and that the defendant recover from the estate of the plaintiff his costs herein expended

CHAPTER II.

CONDUCT OF THE TRIAL.

SUBDIVISION I. SUMMONING AND IMPANELING THE JURY.

II. TRIAL BY JURY, AND VERDICT.

III. TRIAL BY THE COURT.

IV. TRIAL BY REFERREES

V. TRIAL BY MASTER COMMISSIONER.

VI. TRIAL ON APPEAL.

SUBDIVISION I.—SUMMONING AND IMPANELING THE JURY.

APPORTIONMENT OF JURORS—

94. (Sec. 5162.) Order fixing number of jurors for the year.

95. (Sec. 5162.) Order amending.

96. (Sec. 5167.) Order directing number to be drawn, etc.

THE REGULAR PETIT JURY—

97. (Sec. 5168) Order that petit jurors be drawn for special term.

98. (Sec. 5172.) Order for a second, or a new petit jury.

99. Entry on return of venire.
 100. (Sec. 5172.) Order to fill when panel becomes incomplete.

JURY FOR THE TRIAL OF ANY PARTICULAR CASE—

104. (Secs. 5171 and 5173.) Order for venire for talesmen selected by the court, etc.
 105. (Secs. 5171 and 5173.) Same, when the array has been set aside.
 106. Entry on return of venire in last two cases—panel complete.
 107. Entry on return of venire—when panel incomplete.
 108. (Sec. 5174.) Order that venire issue to coroner.
 109. (Sec. 5175.) Array set aside.

STRUCK JURY—

110. (Sec. 5187.) Venire returned, sheriff ordered to summon bystanders.
 111. (Sec. 5188.) Order appointing person to act in place of officer.

PUNISHMENT OF JUROR—

112. (Sec. 5178.) Order imposing fine for refusal to serve.
 113. (Sec. 5178.) Order fining for disobeying, etc.
 114. Order fining for misbehavior.
 115. Order dismissing proceedings.

For the law relating to juries in Hamilton and Cuyahoga counties see 78 O. L. 95. The entries under it are in the same form as under the general law, in this subdivision.

APPORTIONMENT OF JURORS.

94. (Sec. 5162, 82 O. L. 31.) *Order fixing the number of jurors for the year.*

It is hereby ordered that the number of persons to be selected in this county of —— to serve as grand and petit jurors for the current year, in the several courts, be fixed at ——.

95. (Sec. 5162 82 O. L. 31.) *Order amending, or for additional apportionment.*

It appearing that the number of persons heretofore ordered to be selected in the county to serve as grand and petit jurors is too small, [or, by Sec 5166, 82 O. L. 167, that the names of the persons heretofore selected to serve as jurors for the several courts have all been drawn from the box, or, that there is not a sufficient number of names heretofore selected as jurors for the several courts left in the box for the transaction of the business of said courts for the unexpired portion of the year,]

it is therefore ordered that — additional persons be selected from, by apportionment among, the several townships and wards in this county, to serve as grand and petit jurors as aforesaid.

THE REGULAR PETIT JURY—

The jury law does not draw as close a distinction as it might between the formation of the regular petit jury, and the making up of a jury for the trial of any particular case.

It seems, however, to require a full, regular petit jury at the beginning of the term,¹ and to contemplate, but not absolutely to require, its being kept full during the term. If it becomes incomplete by reason of sickness, absence, or otherwise, it may be made complete by the court of its own motion, first exhausting the whole number of persons summoned as petit jurors,¹ and after that ordering the names required to be drawn from the box by the clerk, and causing a venire to be issued to summon them to appear, and the jurors so added shall, for the remainder of the term, constitute a part of the regular jury,² or the sheriff may, probably, by section 5171, summon talesmen to supply the deficiency in the panel of the regular jury, at any time after the jurors first summoned are exhausted.

The journal entries concerning the formation of the regular jury are entered upon the journal as general orders, not under the head of any particular case.

96. (Sec. 5167, 86 O. L. 51.) *Order directing the number of petit jurors to be drawn from the box.*

It is hereby directed that at the next regular drawing of petit jurors, the clerk draw, in addition to the regular number, — ballots and that the persons named thereon be summoned with the others as petit jurors in this court.

97. (Sec. 5168, 82 O. L. 31.) *Order that petit jurors be drawn for special term.*

The clerk of this court is hereby directed to draw forthwith from the jury box the names of twelve persons to serve

¹See sec. 5167, as amended, 82 O. L. 91.

²See sec. 5172, 82 O. L. 167.

as petit jurors at a special term of this court; and a *venire* is ordered accordingly for the appearance of said jurors on the — day of —, 18—.

98. (Sec. 5172, 82 O. L. 167.) *Order for a second or a new petit jury.*

It being necessary by reason of [*state cause*] to have two petit juries, [*or, a new petit jury,*] it is ordered that the names of — jurors therefor be drawn from the box by the clerk of the court, and that a *venire* be issued summoning them to appear on the — inst.

Upon the return of the regular *venire* for jurors, as well as upon the return of any special *venire*, a journal entry should be made showing the return of the sheriff, the appearance of the jurors on their names being called, and any direction that the court may give.

99. *Entry on return of a venire facias for petit jury.*

The *venire facias* heretofore issued for petit jurors, returnable [*state time*], was this day returned by the sheriff of this county, with his indorsement thereon as follows, to wit:

18—, February 5th. Served the within, etc. [*Copy return.*]

And upon calling the same in open court, C. D. was for good cause excused and his name returned to the box [*or, his name by order of court not returned to the box*]¹ * and the panel filled by the following named persons who appeared in answer to the call, viz: A. B., E. F., G. H., [*to the number of twelve.*]²

If the names are exhausted without completing the panel, make the record as above to * and continue:—

And the panel being incomplete, the sheriff summoned R. H. and S. T. to make up the deficiency,³ and the panel was completed.

¹ By sec. 5170, 78 O. L. 109.

² By sec. 5167, as amended, 86 O. L. 51.

³ By sec. 5171.

100. (Sec. 5172, 82 O. L. 167.) *Order to fill when panel becomes incomplete.*

The panel of the regular petit jury having become incomplete, it is ordered that the names of — jurors be drawn from the box, to fill up the same, and that a venire issue summoning them to appear on the — day of —, 18—, at — o'clock A. M.

JURY FOR THE TRIAL OF ANY PARTICULAR CASE.

All entries required in this case should be made under the title of the action for the trial of which the jury is called.

The parties to an action may try it before the regular petit jury, or may have a struck jury.¹

In the first case, if the panel of the regular jury is not full when the cause comes for trial, or if any of the jurors are challenged,² the deficiency may be supplied, for that trial only, by talesmen summoned by the sheriff³ unless on application the judge makes the selection;⁴ but no person known to be present in or about the court-house shall be summoned unless both parties assent thereto.⁴ Or, the talesmen, needed to complete the panel, may probably be summoned as regular jurors, either by the sheriff under section 5171, or by the judge ordering the names to be drawn from the box, under section 5172, 82 O. L. 167, as in entry No. 100.

104. (Sees. 5171 and 5173.) *Order for venire for talesmen selected by the court when a sufficient number of regular jurors not present.*

[Title.]

And now, the petit jury being incomplete by reason of challenge [*or other cause*], it is ordered, on motion of the plaintiff [*or, defendant*] herein, that a venire issue for D. B., A. II.,⁵ etc., to make up the deficiency for the trial of this case; which said venire shall be returnable forthwith [*or at any specified time*].

¹ Sec. 5185.

² Sec. 5176.

³ Sec. 5171.

⁴ Sec. 5173.

⁵ Can not be any one known to be in or about the court-house, without consent of both parties. See sec. 5173.

105. (Secs. 5171 and 5173.) *Same as last when the array has been set aside.*

[*Title.*]

The array of the regular petit jury having been set aside, it is now, on motion of the plaintiff [*or, defendant*] herein, ordered that a venire issue for D. B., A. H., R. M., etc., as jurors for the trial of this case, returnable forthwith [*or at any specified time.*]

106. *Entry on the return of the venire in last two cases; panel complete.*

[*Title.*]

The venire herein issued, returnable this day, was duly returned by the sheriff, with his indorsement thereon, as follows, to wit: [*copy the return.*]

And, upon calling the same in open court, D. B., A. H., etc., appeared in answer to the call of their names, and on motion were accepted as jurors,* and the panel was complete.

107. *Entry on return of venire when panel incomplete.*

[*Title.*]

*Same form as last to * and continue:*]—and the panel being incomplete, it was ordered that a venire issue for L. S. and T. R., returnable forthwith.

108. (Sec. 5174.) *Order that venire issue to coroner.*

[*Title.*]

It being made to appear to the court that the sheriff is interested in this cause, on motion of the —, it is ordered that a special venire be directed to the coroner of the county, commanding him to summon a jury to try this cause.

If the coroner is interested also, state the fact, and order that the special venire be directed to any other discreet, disinterested person.

109. (Sec. 5175, 81 O. L. 43.) *Array set aside.*

[*Title.*]

And now the — having challenged the array of the jury

in this case, and it appearing to the court that [*state cause*], it is ordered that the said array be, and it hereby is, set aside, and said jurors are discharged.

The array being set aside, the court may, on its own motion, by section 5172, order a new regular petit jury to be drawn from the box, for which see entry No. 100; or, by section 5171, the deficiency may be made up by talesmen summoned by the sheriff. In the latter case no journal entry appears to be necessary. Or, by section 5173, the talesmen may, on motion of either party, be selected by the court, and a venire be issued for the persons selected, for which see entry No. 105.

For entries under section 5178 see pages 54 and 55.

STRUCK JURY.

The struck jury is made up as provided by section 5185, *et seq.* of the code, and no order of the court is needed, unless the sixteen jurors are exhausted without completing the panel.

But on the sheriff's return of the venire facias issued to him, an entry should be made of the same, under the title of the case, as follows:

If the panel is complete, use form of entry No. 106. If incomplete and on motion of either party, the court select the persons to fill the panel, use form of entry No. 107. If it is filled from the bystanders make entry as follows:

110. (Sec. 5187) *Venire returned, sheriff ordered to summon bystanders.*

[*Title.*]

As in entry No. 106 as far as ✽ and continue:—and the panel being incomplete, the court ordered the sheriff to summon from among the bystanders so many good and lawful men as are necessary to complete the same; whereupon the following named persons were called, to wit [*name persons*], and the panel was complete.

111. (Sec. 5188.) *Order appointing person to act in place of officer.*

[*Title.*]

It appearing that R. M., the recorder [*or, clerk, or, aud-*

itor] of the county, is [*state cause*], S. R. is hereby appointed to take the place of the said R. M. in selecting and striking the jury demanded in this case, and to do all things required to be done by the recorder when acting in this behalf.

PUNISHMENT OF JUROR—

If the offending juror is not before the court, he may be brought in by regular proceedings, as in case of contempt, for which see CONTEMPTS OF COURT.

If the juror is present in court, the investigation of his contempt may be had at once, and, if found guilty, a fine be imposed upon him, which fine may be collected by execution.

112. (Sec. 5178.) *Order imposing fine for refusal to serve.*

[*Title.*]

And now M. N. having been summoned as a juror in this case, and having refused to serve as such, was examined under oath touching his said refusal; and the court finding no reasonable cause therefor, find that he has been guilty of a contempt of court.

It is therefore ordered and adjudged that a fine of — dollars¹ be, and hereby is, imposed upon the said M. N., and that he pay the costs of this proceeding; and execution is awarded therefor.

113. (Sec. 5178.) *Order fining for disobeying, etc.*

[*Title.*]

And now N. R., one of the jurors duly qualified herein, having been charged with disobeying the order of the court [*state in what particular*], was examined * under oath [and upon testimony of witnesses] touching his said offense. And the court find said charge to be true, and that the said N. R. is thereby guilty of a contempt of court.

It is therefore ordered and adjudged that a fine of — dollars² be, and hereby is, imposed upon the said N. R., and that he pay the costs of this proceeding; and execution is awarded therefor.

¹Can not exceed thirty dollars.

²Can not exceed one thousand dollars.

114. *Order fining for misbehavior.*[*Title.*]

And now N. R., one of the jurors duly qualified herein, having been charged with misbehavior in this, to wit: [*state particulars*], was examined, etc. [*as from* ❖, *in last order*].

115. *Order dismissing proceedings.*[*Title.*]

As in No. 113 to ❖, *and conclude:*]—under oath and upon testimony of witnesses touching his said offense, and the court find that said charge is not sustained.

It is therefore ordered and adjudged that these proceedings against the said N. R. be, and they are hereby, dismissed at the cost of —.

SUBDIVISION II.—TRIAL BY JURY AND VERDICT.

FORMULA I; JURY IMPANELED AND SWORN.

116. Entry when verdict is returned on the day the trial is begun.

CAUSE PROGRESSED—

117. Cause progressed—first day.

118. Cause progressed—succeeding day.

119. Cause progressed—verdict given.

FORMS OF VERDICT.

SEALED VERDICT—

120. Order for.

VIEW OF PROPERTY—

121. (Sec. 5191.) Order for jury to view.

DISCHARGE OF THE JURY BEFORE VERDICT—

122. (Sec. 5195.) For sickness or other calamity.

123. Order that cause proceed with eleven jurymen.

124. Order substituting juror.

125. (Sec. 5195.) Jury discharged by consent.

126. (Sec. 5195.) Being unable to agree, jury discharged.

127. Juror withdrawn, and case continued.

ARREST OF TESTIMONY FROM JURY—

128. Evidence withdrawn, and judgment for defendant.

If the trial proceeds regularly and without interruption to the rendition of the verdict and the judgment of the court, the forms in all cases are very similar. But various interlocutory orders may also be made during the trial, or the trial may not come to a verdict.

The first entry after the jury is formed, as shown in the last subdi-

vision, will show the impaneling and swearing of the jury. The entry as a formula to be prefixed to any subsequent order is given below.

FORMULA I; JURY IMPANELED AND SWORN.

[*Title.*]

This day came the parties herein, by their attorneys; also came the following-named persons as jurors, to wit:

1. A. B.

7. J. K.

2. C. D.

8. M. P.

etc.

etc.

who were duly impaneled and sworn according to law; and thereupon the case came on for hearing on the pleadings and evidence.

If the trial is completed on the day it is begun, make the entry as follows:

116. *Entry on return of verdict.*

[*Title.*]

Formula above, and continue:]—

And after hearing the evidence, argument, and charge of the court, the jury retired to their room, in charge of the sheriff, for deliberation.

And now comes said jury into open court with their verdict in writing, signed by their foreman, and say:¹ “We, the jury, find, on the issue joined, for the —, and assess his damages at — dollars.”

[Signed,]

C. D.,

Foreman.

If the jury is polled, as provided for in sec. 5198, add:]

And the jury being polled, on the request of the —, each juror, on being inquired of if it was his verdict, answered in the affirmative.

CAUSE PROGRESSED—

If the trial is not completed on the day it is begun, the entry should show the stage of proceeding reached; and on each succeeding day an

¹The verdict or finding must be filed with the clerk and entered on the journal. Sec. 5201. For forms of other verdicts, see pages 58 and 59.

entry should show the proceedings had, until the trial is concluded. This furnishes a warrant for paying the jurors' fees.

The following are given as examples of the orders that may be made:

117. *Cause progressed—first day.*

[*Title.*]

Formula, p. 56, and continue:]—

And the said jury having heard the testimony adduced in part,† said cause was continued until to-morrow morning at 10 o'clock.

Or say:]—

†The court adjourned until to-morrow morning at 10 o'clock.

118. *Cause progressed—second, or succeeding day.*

[*Title.*]

This day again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn,* and the trial proceeded. And the said jury having heard the remaining testimony, the argument, and charge of the court, retired to their room, in charge of the sheriff, for deliberation.† And the hour of adjournment having arrived, the court discharged said jury until to-morrow morning at 10 o'clock.

Or say:]—

†And the parties not being ready to proceed with the trial, it was continued until, etc.

On the day that the verdict is rendered, take up the proceedings at the point reached the day before, and conclude with the verdict. For example:

119. *Cause progressed—verdict given.*

[*Title.*]

This day again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn herein, and retired to their room, in charge of the sheriff, for further consultation.*

And now come the said jury into open court with their verdict in writing, signed by their foreman, and say: [*copy verdict; and if the jury is polled, add as after Entry 116.*]

FORMS OF VERDICT—

The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only.¹ It must find the truth of the facts. It will not do to refer the evidence to the court and ask their judgment upon it.¹² And to authorize a judgment on it, all the facts essential to the right of the party in whose favor judgment is to be rendered, must be found by the jury.²³

The verdict or finding must be filed with the clerk and entered on the journal.⁴

The forms of verdict may be as follows:

General verdict for damages.

“We, the jury, find on the issue joined for the plaintiff [or, defendant], and assess his damages at ——— dollars.”

C. D.,

Foreman.

General verdict for defendant.

“We, the jury, find on the issue joined for the defendant.”

C. D.,

Foreman.

Special verdict.

“We, the jury, on the issue joined, find that, at the time the debt was contracted, there was a firm doing business as J. R. R. & Co., and that R. and K. were members of the firm.”

[Signed,]

C. D.,

Foreman.

If, by direction of the court, special questions have been submitted to the jury for answer, the verdict may be as follows:

¹Sec. 5200. See also *Hambleton v. Dempsey & Co.*, 20 Ohio, 168.

²Leach v. Church, 10 Ohio St. 148.

³Blake's Lessees v. Davis, 20 Ohio, 231.

⁴Sec. 5201.

General verdict, with special finding on particular questions.

"We, the jury, on the general issue joined, find for the —, and assess his damages at — dollars. And in response to the questions propounded to us, we return the same with our special findings thereon, as follows:

1. "Was there, at the time the debt was contracted, such a firm doing business as J. R. R. & Co.?" Answer. "Yes."

2. "Were R. & K. members of the firm, if it existed?" Answer. "No."

3. "If not members of the firm, then did their acts, declarations, or mode of doing business, induce the plaintiff to believe them to be partners of R. & Co.?" Answer. "Yes."

[Signed,]

C. D.,

Foreman.

SEALED VERDICT—

If, at the hour of adjournment, the jury have not agreed upon a verdict, but there is a probability of their agreeing before the next morning, the court may, upon adjournment, leave the jury, with instructions to return their verdict sealed at some specified time.

120. *Order for sealed verdict.*

[*Title.*]

As in No. 118 to †, and continue:]—and the hour of adjournment having arrived, the court orders that, if said jury agree upon a verdict, they return the same sealed to this court to-morrow morning at 10 o'clock.

VIEW OF PROPERTY—

121. (Sec. 5191.) *Order for jury to view.*

[*Title.*]

On motion, it is ordered that the jury be conducted in a body, in charge of the sheriff, to view the premises in controversy herein, and that the same be shown to them by F. G.; and that they return to-morrow morning at 10 o'clock.

DISCHARGE OF THE JURY BEFORE VERDICT—

122. (Sec. 5195.) *For sickness or other calamity.*

[*Title.*]

This day again came the said parties, by their attorneys, and it appearing that L. M., one of the jurors, is unable, by

reason of sickness [*or other calamity*], further to attend this trial,* the court therefore discharge the said jury without day; and the case is continued.

If the parties desire to go on with the trial, in case of disability of a juror, one of the two following entries may be made.

123. *Order that case proceed with eleven jurymen, by consent.*

[*Title.*]

*As in last to *, and continue:]*—and the remaining eleven jurors heretofore impaneled and sworn, now coming, the trial, by consent of both parties, proceeded.

124. *Order substituting juror, by consent.*

[*Title.*]

*As in No. 122 to *, and continue:]*—and the remaining eleven jurors heretofore impaneled and sworn, now coming, by consent of both parties, M. N. is summoned and called from the bystanders, and substituted for the said L. M. as a juror in this case, and is sworn accordingly; and the trial proceeds.

125. (Sec. 5195.) *Jury discharged by consent.*

[*Title.*]

This day again came the said parties, by their attorneys; also came the jury heretofore impaneled and sworn. And, by consent of both parties, the court discharged the said jury without day, and the case is continued at the cost of the —.

126. (Sec. 5195.) *Being unable to agree, jury discharged.*

[*Title.*]

This day came the said parties, by their attorneys; also came the jury heretofore impaneled and sworn, and retired to their room, in charge of the sheriff, for further consultation.

And now come said jury into open court, and state that they are unable to agree upon a verdict, whereupon they are, by the court, discharged from further consideration of this case, and the case is continued.

127. *Juror withdrawn by consent, and case continued.*

[*Title.*]

This day again came the said parties, by their attorneys, and the jury heretofore impaneled and sworn; and, by consent of parties, one of the said jurors is withdrawn from the panel, and the residue of the said jury is discharged from further consideration of the case, and the cause is continued at the cost of the —.

ARREST OF TESTIMONY FROM JURY—

Nonsuit at common law, and as recognized in Ohio before the code, was voluntary or by order of the court. Voluntary nonsuit occurred upon the plaintiff voluntarily failing to follow or pursue his complaint.¹ It would, under the practice in Ohio before the code, be ordered by the court only when there was some essential fact to the plaintiff's claim, to establish which *no* evidence had been given. If evidence, however slight, tending to prove all the facts essential to make out a case for the plaintiff had been given, the motion was denied.²

The effect of a nonsuit was not final, the plaintiff being at liberty to recommence his action.^{1 3}

Under the code, and since the act of April 12, 1858 (2 S. & C. 1155), the court is authorized in a proper case to arrest the testimony from the jury, and render judgment for the defendant. But such judgment has not the effect of a nonsuit at common law, but is, under the provision of the code (see, 372, Rev. Stat. 5314), a decision of the action upon the merits.⁴ It is substantially the same as the submission of the case to the jury under instructions to return a verdict for the defendant, the same result being reached in either case.⁴ So that a nonsuit, as understood at common law and in Ohio before the code, is at present unknown.

The conditions making it proper for the court to withdraw the evidence from the jury and render judgment for the defendant, are the same as authorized a nonsuit before the code. If the evidence *tends* to prove all the facts which it is incumbent on the plaintiff to establish in order to maintain his action, he has a right to have the weight and sufficiency of the evidence passed upon by the jury, and it is error for the court to grant the motion, and render judgment against him.⁴

¹ 3 Bl. 316, 377.

² *Ellis & Morton v. Ohio Life Ins. and Trust Co.*, 4 Ohio St. 628.

³ *Reed v. Carpenter*, 2 Ohio, 87.

⁴ *Stockstill v. D. & M. R. R. Co.*, 24 Ohio St. 86.

But if there is a fact, without the establishment of which, the plaintiff can not maintain his action, and *no* evidence be offered to prove it, then, upon motion of the defendant, the court may order that the evidence be withdrawn from the court or jury, and judgment be rendered for the defendant. And it will be a decision upon the merits.

128. *Evidence withdrawn, and judgment for defendant.*

[*Title.*]

Formula 1, p. 56, and continue:—

And the evidence for the plaintiff being heard, the defendant thereupon moved the court to arrest the testimony from the jury, and for judgment; and the argument of counsel being heard thereon, the court, on consideration, grant the same.

It is therefore considered by the court that the evidence of the plaintiff be withdrawn from the jury, and that said jury be, and hereby are discharged from further consideration of this case; and that the defendant go hence without day, and recover from the plaintiff his costs herein expended.

SUBDIVISION III.—TRIAL BY THE COURT.

129. (Sec. 5205.) Finding by the court on issue triable only by the court.

129a. (Sec. 5205.) Finding by the court—jury waived.

130. (Sec. 5205.) Separate finding of fact and law.

131. (Sec. 5207.) Judgment on controversy submitted.

It is usual to enter judgment, on trial by the court, at the time of making the finding, unless there be a special reason for delaying the judgment; and if a new trial is desired by either party, the motion and order will be “to set aside the judgment and for a new trial.” As judgments entered in this way have several times been reviewed by the supreme court, without any objection on that point being raised, the practice seems to be sanctioned.

But as the finding of the court is sometimes made and entered, like a verdict of the jury, before the judgment, forms are here given. It is only required by the statute that the court state its finding, gener-

ally, for plaintiff or defendant, unless requested by one of the parties to make a separate finding of facts and law. (See sec. 5205.)

The cases to be tried by the court are, *first*, those wherein the issue is primarily triable by the court alone;¹ or, *second*, such as are primarily triable by jury, in which the jury is waived.¹ The formal beginning of the judgment entries are usually different in the two cases.

129. (Sec. 5205.) *Finding by the court on issue triable only by the court.*

[*Title.*]

This cause now coming on for hearing, was submitted to the court upon the pleadings [*or the several pleadings may be particularly named*] and the evidence; and, on consideration thereof, the court find on the issue joined for the plaintiff [*or, defendant*], and find that the — is indebted to him in the sum of — dollars.

129a. (Sec. 5205.) *Finding by the court—jury waived.*

[*Title.*]

This cause now coming on for hearing, and a jury having been waived, was submitted to the court upon the pleadings [*or the several pleadings may be particularly named*] and the evidence; and, on consideration thereof, the court find on the issue joined for the plaintiff [*or, defendant*], and find that the — is indebted to him in the sum of — dollars.

130. (Sec. 5205.) *Separate finding of fact and law.*

[*Title.*]

This cause now coming on for hearing, and a jury being waived, was submitted to the court on the pleadings and evidence. And the court being fully advised in the premises, on the request of the — that its conclusions of fact be stated separately from its conclusions of law, find, as its conclusions of fact, that [*give finding.*]

¹See secs. 5130 and 5131.

And as its conclusions of law upon the above facts, the court find that [*give finding*].¹

131. (Sec. 5207.) *Judgment on controversy submitted.*²

[*Title.*]

This day came the parties above named, and presented to the court a submission of a question of difference between them upon an agreed statement of facts. And the court, upon due consideration thereof, upon said statement, find the law of the case to be with the said A. B., and find that the said C. D. is indebted to him in the sum of \$——.

It is therefore considered by the court that the said A. B. recover from the said C. D. the said sum of —— dollars, and that the said C. D. pay the costs of this proceeding; for all of which execution is awarded.

SUBDIVISION IV.—TRIAL BY REFEREES.

132. (Sec. 5210.) Order of reference, for trial.

133. (Sec. 5210.) Order of reference to ascertain and report the facts.

134. (Sec. 5212.) Order substituting referee, etc.

135. Order to compel report of referee.

136. (Sec. 5213.) Judgment on the report finding facts and law, when no motion for a new trial has been made.

137. Motion to set aside report finding facts and law overruled, and judgment entered.

138. (Sec. 5213.) Judgment on report finding facts only, when no motion for a new trial has been filed.

139. (Sec. 5213.) Motion to set aside report finding facts only, overruled and judgment entered.

140. (Sec. 5305.) Report set aside, and a new trial granted.

141. (Sec. 5305.) Same, before another referee.

Instead of submitting a case to a jury or the court, the code provides for a third method of deciding the issues of fact and law, and this is

¹ As to what will be regarded as a statement of the court's conclusion of law, see *Levi v. Daniels*, 22 Ohio St. 38.

² No authority is contained in section 372 of the code (Ohio Code, 5207) for the submission of actions; it relates solely to the submission of questions of difference without action. *Van Sickie v. Van Sickie*, 8 How. (N. Y.), 265.

by referees. The referees are substituted for the court and jury, and their province is to decide the facts of the case, if the facts only are submitted, or both the facts and law of the case, if both are referred. The trial before the referees is conducted in the same manner as a trial by the court on submission. The evidence is not to be reduced to writing unless specially ordered. All such exceptions as could be made in the progress of a trial before the court may be taken by either party in a trial before referees. When the reference is to report facts only, the report has the effect of a special verdict; if the reference is of the facts and law, the facts and the conclusions of law are stated separately, and the report stands as the decision of the court, and judgment may be entered thereon as if the action had been tried by the court. The decision of the referee, however, may be reviewed by the court.

These provisions show very clearly that, while the trial before referees is subject to the review and revision of the court ordering the reference, it is a substitute for a trial in court. The finding of the facts is, in effect, the special verdict of a jury. The conclusions of law of the referees stand as the law decision of the court, and, if not set aside, a judgment follows of course.¹ The report of the referee upon the whole issue requires no confirmation, inasmuch as it stands as the decision of the court, by direct provision of the statute.² So, also, when the reference is to report the facts, no confirmation would seem necessary, the report having, by force of the statute, the effect of a special verdict.²

REVIEW OF REFEREE'S DECISION—

Section 5213 provides that referees "must state the facts found, and the conclusions of law, separately, and their decision must be given, and may be excepted to and reviewed in like manner" as the decision of the court when the report is upon the whole issue, and as a special verdict when the report is only upon the facts.

The meaning of this section seems to be, not that the referee's court is to be regarded as distinct from the common pleas, so as to require parties to go from that to the common pleas by error or appeal, as from one court to a higher, but rather to make the referee an officer of the common pleas court, so that his finding is the finding of the court. During the progress of the trial before the referee he is the substitute for the judge; the trial is conducted, and exceptions taken to his rulings upon the trial and allowed in the same manner as before the judge

¹ *Lawson v. Bissell*, 7 Ohio St. 132; *Cincinnati v. Cameron*, 33 Ohio St. 336.

² Sec. 5213.

upon submission.¹ The bill of exceptions, showing enough of the testimony to explain the exceptions, made up as in other cases, signed by the referee, will be returned by him with his report to the court,² to be brought before the court by a motion for a new trial under section 5305, sub. 8.

If, when the referee makes his finding, either party wishes a review upon the finding of fact or law, he need not except to the finding,³ but must file with the court, after the report is filed, a motion, under section 5305, sub. 6, for a new trial, on the ground that the report is not sustained by sufficient evidence, or is contrary to law, or both, according to what he objects to, including any other causes he may desire. This is probably all that is required to bring the case before the common pleas for review of the finding of law, when the party is satisfied with the finding of facts. But if his ground for a new trial is that the report is not sustained by sufficient evidence, in a case where the testimony has not been reduced to writing by the referee, the party must also file with the referee, before he makes his report, a motion for a new trial on the ground that the finding is against the evidence,⁴ and, upon the motion being overruled by the referee, he can except to the decision,⁵ and embody his exception, with enough of the testimony to explain it, in a bill of exceptions, which will be signed by the referee and also returned with his report to the court. This appears to be the only way of bringing the testimony before the court for review in such a case. If, however, the testimony has been reduced to writing by the referee, under sec. 5213, it is probably sufficient for the party to file his motion in the court alone, as above set forth. If, in either of the above cases, the court overrules the motion for a new trial, and judgment is entered on the report, the party may except and have his proceedings in error to the district court as in other cases; or, if a proper case, may appeal from the judgment by virtue of sections 5226–5239. An appeal vacates the report of the referees, and the case stands for trial in the district court as if no reference had been made below.⁶

¹ See *Cincinnati v. Cameron*, 33 Ohio St. 356.

² Sec. 5216. See also *Lawson v. Bissell*, 7 Ohio St. 129, 132.

³ See *Kline v. Wynne et al.*, 10 Ohio St. 223, 226.

⁴ Sec. 5301 in connection with sec. 5213. See also *Westfall v. Dugan*, 14 Ohio St. 276, and *Randall v. Turner*, 17 Ohio St. 262.

⁵ By sec. 5301.

⁶ *Lawson v. Bissell*, 7 Ohio St. 130.

132. (Sec. 5210.) *Order of reference, for trial.*[*Title.*]

Now come the parties hereto, and, by their consent [*or, say, On motion of the —, and good cause being shown*], it is ordered that this cause be, and it hereby is, referred to E. F., for trial of the issues both of law and fact [*or either, as the court may direct*] arising therein. And the said referee is ordered to report his findings and decision to this court without unnecessary delay.

[And it is further ordered that the referee reduce the testimony of the witnesses to writing, and require them severally to subscribe the same.]¹

133. (Sec. 5210.) *Order of reference to ascertain and report facts.*[*Title.*]

Now come the parties hereto, and, by their consent [*or, say, On motion of the —, and for good cause shown*], it is ordered that this cause be and it hereby is referred to J. M. F., who is directed to ascertain and find the facts, and report² them to this court.

[It is further ordered that said referee reduce the testimony of the witnesses to writing, and require them severally to subscribe the same.]¹

134. (Sec. 5212.) *Substituting referee by judge of court in vacation.*[*Title.*]

This cause having been heretofore referred by the — court of this county to E. F., as referee, and the said referee being unable to serve by reason of sickness, now upon the written consent of the parties hereto [*or, upon the application of the — herein, and reasonable notice thereof to the*

¹ If it is desired that the referee reduce his testimony to writing, it must be so ordered in the order of reference. See sec. 5213. When so reduced to writing, signed by the witnesses, and reported to the court, it may be used as a deposition, by sec. 5267.

² This report will have the effect of a special verdict. Sec. 5213.

said —], I do hereby order and direct that this case be referred to G. H., as referee, to the same extent and upon the same issues as in the former reference.

And it is ordered that the said G. H. report to the said — court without unnecessary delay.

135. *Order to compel¹ report of referee.*

[*Title.*]

On motion of C. B., attorney for the —, it is ordered that E. F., the referee appointed in this action, report herein within ten days after service of a copy of this order, or show cause why an attachment should not issue against him.

136. (Sec. 5213.) *Judgment on the report finding facts and law, when no motion for a new trial has been made.*

[*Title.*]

And now this cause coming on for hearing on the report of the referee, heretofore filed herein, and on motion of the plaintiff for judgment thereon, and no motion for a new trial having been filed*; it is considered that the plaintiff recover from the defendant the sum of \$—, by said report found to be due, together with his costs herein expended, including the sum of — dollars, which the court allows to T. R., the referee, for his services herein, taxed at \$—.

137. *Motion to set aside report finding facts and law overruled, and judgment on the report.*

[*Title.*]

And now this cause coming on for hearing on the report of the referee, and on the motion to set aside the same and for a new trial,² the court on consideration overrule said motion.*

It is therefore considered, etc., [*as in last decree*].

¹ If he neglect to report, he may be compelled to, by attachment. *Stafford v. Heskith*, 1 Wend. 71.

² By section 5305.

138. (Sec. 5213.) *Judgment on report finding the facts only, when no motion for a new trial has been filed.*

[*Title.*]

And now this cause coming on for hearing on the report of the referee of his finding of facts, and no motion for a new trial having been filed, the court finds that the law arising upon said facts is with the plaintiff, and that there is due him from the defendant the sum of — dollars.

It is therefore considered that the plaintiff recover from the defendant the said sum of \$—, together with his costs herein expended, including the sum of \$—, which the court allows to T. R., the referee, for his services herein, taxed at \$—.

139. (Sec. 5213.) *Motion to set aside report finding facts only overruled, and judgment entered.*

[*Title.*]

And now this cause coming on for hearing on the report of the referee, of his finding of facts, and the motion to set aside the same, the court, on consideration, overrules said motion, and finds that the law arising upon said facts is with the plaintiff, and that there is due him from the defendant the sum of — dollars.

It is therefore considered, etc. [*as in last decree.*]

140. (Sec. 5305.) *Report set aside, and a new trial granted.*

[*Title.*]

And now this cause coming on for hearing on the report of E. F., referee herein, and on the motion to set aside the same, and for a new trial, the court, on consideration, grants the said motion, and said findings and report are hereby vacated, * and a new trial is awarded before the said referee.

141. (Sec. 5305.) *Same, before another referee.*

[*Title.*]

*As in last to *, and continue:—*And the court do hereby discharge and remove the said E. F. from any further hearing or reporting in the said action as referee, and do now, on motion of the said —, hereby appoint G. H. referee in

this action, in lieu and stead of the said E. F., with the same powers and instructions as heretofore given to the said E. F. by the former order of reference. And the said referee now here appointed is directed to report herein without unnecessary delay.

SUBDIVISION V.—TRIAL BY MASTER COMMISSIONERS.

- 142. (Sec. 5219.) Order appointing regular master commissioner.
- 143. (Sec. 5222.) Order of reference to take testimony and report conclusions, etc.
- 144. (Sec. 5222.) Order referring to special master.
- 145. (Sec. 5222.) Confirmation of report, and judgment.
- 146. (Sec. 5222.) Same, another form.
- 147. (Sec. 5222.) Exceptions to report in part sustained, and report modified.
- 148. (Sec. 5222.) Exceptions sustained, and report set aside.

REFERENCE, AS BEFORE THE CODE—

- 149. Order referring case to a master, to take an account.
- 150. Order to ascertain a fact.
- 151. Confirmation of report.

Master commissioners are either regular or special.

The appointment of the special master is made in the order of reference, and the object of his appointment there specified.

Under section 5222, any action in which neither party is entitled to demand a trial by a jury, may be referred to a regular or special master commissioner, for the trial of the issues arising upon the pleadings.¹ This section only applies to cases where the master finds the facts involved in the issues, and does not profess to regulate the practice where the chancellor calls upon a master to state an account, or determine some other fact auxiliary to the final determination of the cause by the court.²

The report may be excepted to by the parties, and be confirmed, modified, or set aside by the court.³

In case of judgment on the report, and appeal taken from the Common Pleas to the District Court, the cause stands for trial in the appellate court upon the same issues as in the court below, and the parties are entitled to introduce any competent testimony, without regard to the question whether it was or might have been introduced before the master.²

¹ Bell v. Crawford, 25 Ohio St. 402, 411, construing section 611 of the old code, which was the same as section 5222, Rev. Stat.

² Ib. 412.

³ Sec. 5222.

142. (Sec. 5219.) *Order appointing regular master commissioner.*

In the matter of the _____)
 appointment of A. B., master commissioner. }

On application of A. B., he is hereby appointed a master commissioner of this court for the term of three years.

And the court direct that the undertaking of the said A. B. as such master commissioner, as required by law, be given in the sum of ———¹ dollars.

And now comes the said A. B., and is duly sworn, and gives his undertaking aforesaid, with R. S. and L. E. as sureties, to the approval of the court.

143. (Sec. 5222.) *Order of reference to master commissioner to take testimony in writing, and report with his conclusions on the law and facts.*

[*Title.*]

On motion of the plaintiff [*or, defendant*], and good cause being shown therefor, it is ordered that this cause be, and it hereby is, referred to F. G., one of the master commissioners of this court, to take the testimony offered by the parties in writing, and report the same to the court, with his conclusions on the law and facts involved in the issues, without unnecessary delay.

[It is further ordered that the said master require the witnesses severally to subscribe their testimony herein.]²

144. (Sec. 5222.) *Order referring to special master.*³

[*Title.*]

On motion to the court by the ——— herein, and for good cause shown, it is ordered that this cause be, and the same hereby is, referred to S. M., who is hereby appointed a special master commissioner for that purpose, who shall forthwith, upon being duly qualified, proceed to [*set out the duty given him.*]

¹ The amount of the undertaking is, in Hamilton county, fixed by custom at fifteen thousand dollars.

² Optional with the court, by section 5223. When so taken and reported to the court, such testimony may be used as a deposition, by section 5267.

³ For appointment in case of sale of specific real property, see SALE OF MORTGAGED PREMISES, p. 106, and the decrees thereunder.

[And it is ordered that, before entering upon his duties, said S. M. shall enter into an undertaking, to the approval of the court and conditioned according to law, in the sum of \$——.]¹

And thereupon came the said S. M., and was duly sworn as such special master, and presented his bond, with S. T. and C. E. as sureties, to the approval of the court.

145. (Sec. 5222.) *Confirmation of report, and judgment.*

[*Title.*]

This cause coming on for hearing on the report of the master commissioner [*or*, special master commissioner], to whom the same was heretofore referred [and the exceptions thereto], on consideration thereof by the court, [the exceptions are overruled, and] the report and all the matters and findings therein are hereby approved * and confirmed.

And the court, upon the said report and testimony, find,² etc.

It is therefore considered by the court that the said —— recover from the said —— the said sum of —— dollars, together with his costs herein expended, including the sum of \$——, which the court allow to the said master for his services herein, taxed at \$——.

146. (Sec. 5222.) *Same—another form.*

[*Title.*]

*As in last to *, and continue:*—and confirmed; and it is ordered that the findings of the said master stand as the findings of the court.

It is therefore considered, etc. [*as in last.*]

147. (Sec. 5222.) *Exceptions to report in part sustained, and report modified.*

[*Title.*]

This cause now coming on to be heard upon the report of

¹ The special master need not give bond, unless so ordered by the court appointing him.

² The finding may be simply of the amount due, or any other special finding. Or it may be, "that the facts are as found by the report of the master."

the master commissioner, to whom said cause was heretofore referred, and the exceptions to the report, the court, upon consideration thereof, sustain the exceptions in part, to wit, the clauses numbered 3 and 4, and overrule the balance; and the report of the referee is accordingly modified in this, to wit [*specify*], and with this modification the said report is confirmed. And the court, upon said report and testimony, find,¹ etc. It is therefore considered, etc. [*conclude with judgment, as in No. 145.*]

148. (Sec. 5222.) *Exceptions to report sustained and report set aside.*

[*Title.*]

This cause now coming on to be heard upon the report of the master commissioner, to whom said cause was heretofore referred, and the exceptions to the report, the court, upon consideration, find the exceptions well made, and sustain the same. The said report is therefore set aside and held for naught.

REFERENCE AS BEFORE THE CODE—

Besides the cases above of reference for trial of the issues, or for ascertaining and reporting the facts, there are a number of sections of the code authorizing a reference for other purposes—as, for instance, section 5477 in proceedings in aid of execution, and section 5559 for a reference to determine amounts and priorities of several attachments. In all of these latter cases, the references should probably be governed by the rules governing references before the code. And so also in cases where the code does not specially provide for a reference, an order of reference may be made to a regular or special master, as allowed before the code, in accordance with the usages of courts of equity for the purpose of taking an account, or ascertaining some other matter ancillary to the determination of the cause by the court. And the referee may be instructed to report the testimony with his findings to the court.² The report of the referee in all of the above cases should always be confirmed, where it is required for the purpose of enabling the court to make some discretionary order or decree, before it is adopted as the foundation of an order or decree.³

¹ May be simply of amount due, or may be any other special finding shown by the report.

² See *Bell v. Crawford*, 25 Ohio St. 410-413.

³ *Daniels' Chancery Pl. and Pr.* 1308.

Exceptions may be filed to the report, and if overruled, the report confirmed, and judgment entered by the court, and an appeal be taken, the report is not vacated by the appeal, but is brought up to the appellate court for confirmation, modification, or vacation, as it stood in the court below, and neither party can introduce additional testimony, unless upon some equitable showing.¹

149. *Order referring case to a master to take an account.*

[*Title.*]

On motion of the —, and for good cause shown, it is ordered that this cause be, and the same hereby is, referred to F. G., one of the master commissioners of this court, with all the powers of a master in chancery.* to take an account, and ascertain and report to this court the amount due, etc. [*specify.*] And the said master is ordered to report [the testimony,² with] his findings, to the court, without unnecessary delay.

150. — *to ascertain a fact.*

[*Title.*]

*As in last to *, and continue:*—to ascertain and report to this court [*specify the fact to be determined.*] And the said master is ordered to report [the testimony,² with] his findings, to the court, without unnecessary delay.

151. *Confirmation of report.*

[*Title.*]

This cause now coming on for hearing on the report of the referee [*or, master commissioner: or, special master commissioner*], to whom the same was heretofore referred [and the exceptions thereto], on consideration thereof by the court [the exceptions are overruled, and] the report and all the matters and findings therein are hereby approved and confirmed as the finding of the court.

Judgment may or may not accompany the confirmation of the master's report, according to the nature of the facts reported. If they are of

¹ See *Bell v. Crawford*, 25 Ohio St. 410, 411, 413.

² Optional with the court.

such a nature as to entitle the party to a judgment, without further finding of facts, the court will render its judgment when it confirms the report. In that case the entry may be the same as No. 145 or 146.

Entries of exceptions sustained and report modified or set aside, may also be made by slightly modifying Entries Nos. 147 and 148.

SUBDIVISION VI.—TRIAL ON APPEAL.

APPEAL FROM THE COMMON PLEAS TO THE CIRCUIT COURT—ENTRIES IN THE
COMMON PLEAS—

- 151a. (Sec. 5226.) Notice of appeal from order dissolving injunction, etc.
- 152. (Sec. 5227.) Notice of appeal.
- 153. (Sec. 5229.) Notice of appeal by administrator or executor.
- 154. (Sec. 5230.) Order fixing penalty of appeal bond, etc.
- 155. (Sec. 5232.) Notice of appeal by one of several parties.

ENTRIES IN THE CIRCUIT COURT—

- 155a. (Sec. 5226.) Suspending execution of order dissolving injunction.
- 156. (Sec. 5233.) Order for new undertaking.
- 157. (Sec. 5233.) Appeal dismissed for want of new undertaking.
- 157a. (Sec. 5235.) Suspending execution of judgment for injunction.
- 158. (Sec. 5237.) Judgment for plaintiff who fails to recover more, etc.
- 159. (Sec. 5238.) Penalty allowed when there was no reasonable ground
for appeal—in case of money judgment.
- 159a. (Sec. 5238.) Same—in case of judgment other than for money.
- 160. (Sec. 5238.) Penalty when appeal is for delay—money judgment.
- 160a. (Sec. 5238.) Same—in case of judgment other than for money.
- 161. (Sec. 5238.) No penalty allowed.
- 162. (Sec. 5239.) Entry remanding to common pleas court.
- 163. (Sec. 5239.) Same—in decree for sale.

APPEAL FROM A JUSTICE TO THE COURT OF COMMON PLEAS.

1st. *In case of appellant's failure to file transcript.*

- 164. (Sec. 6588.) Case docketed, etc., and judgment in common pleas.
- 165. (Sec. 6588.) Case docketed, etc., and appeal dismissed.

2d. *In case of plaintiff's failure to file petition after transcript filed.*

- 166. Dismissal for want of petition.
- 167. (Sec. 6589.) Judgment for defendant.

3d. *In other cases.*

- 168. (Sec. 6594.) Judgment quashing an appeal.
- 169. Appeal dismissed for want of jurisdiction.
- 170. (Sec. 6595.) Order for new undertaking.

APPEAL FROM PROBATE COURT TO THE COURT OF COMMON PLEAS.

APPEAL FROM COUNTY COMMISSIONERS TO THE COURT OF COMMON PLEAS.

- 170a. (Sec. 896.) Judgment on appeal.

APPEAL FROM THE COMMON PLEAS TO THE CIRCUIT COURT; ENTRIES
IN THE COMMON PLEAS—

The notice of appeal may be entered on the journal as a separate entry, or may be added to the judgment or order appealed from. The omission to enter on the journal notice of appeal within the term, can not be cured by a *nunc pro tunc* entry at a subsequent term.¹

If an appeal is taken from an interlocutory order made by the Common Pleas Court dissolving an injunction in a case of which it had original jurisdiction, as by sec. 5226, 82 O. L. 32, it may be the Common Pleas Court may suspend the operation of the order for any period not exceeding ten days. But the appeal and appeal bond will not further suspend the execution of the order except by order of the Circuit Court, or two judges thereof in vacation.

151a. (Sec. 5226, 82 O. L. 32.) *Notice of appeal from order dissolving injunction, and order suspended.*

Add to entry No. 350, page 191:]

And the — giving notice of an appeal to the Circuit Court, and good cause being shown, the operation of this order is suspended for — days.

152. (Sec. 5227.) *Notice of appeal.*

[Title.]

Now comes the —, and gives notice of his intention to appeal this cause to the Circuit Court.

The court may add by virtue of sec. 5231:]

And the court directs that the appeal bond be made payable to *[the adverse party, or otherwise, in its discretion.]*

Also by secs. 5226, 82 O. L. 32, and 5234:] And on motion of the — execution is stayed for — days. *[Add terms, if any.]*

153. (Sec. 5229.) *Notice of appeal by administrator or executor.*

[Title.]

Now comes R. S., administrator of the — herein, who has died since giving notice of appeal, and gives notice of

¹ Moore v. Brown, 10 Ohio, 197.

his intention as such administrator to appeal this cause to the Circuit Court; and the said R. S. having as such administrator given bond in this state according to law, no appeal bond is required.¹

154. (Sec. 5230.) *Order fixing penalty of appeal bond in case of judgment other than personal for money.*

Add to the judgment entry:]

And the court fix the penalty of the bond to be given in case of appeal at —— dollars.

155. (Sec. 5232.) *Notice of appeal by one of several parties.*

[Title.]

And now comes the said E. F., one of the above ——, and gives notice of his intention to appeal so much of this cause as affects him to the Circuit Court; and, on motion, his said appeal is allowed on his giving bond in the sum of —— dollars, conditioned [*here state the condition as fixed by the court, and any order as to papers and pleadings. The same clauses may also be added as after entry No. 152.*]

APPEAL FROM THE COMMON PLEAS—ENTRIES IN THE CIRCUIT COURT.

Entries amending pleadings,² and making new parties³ in the District Court, will be the same as in the Common Pleas.

155a. (Sec. 5226, 82 O. L. 32.) *Suspending execution of order made by Common Pleas dissolving injunction.*

[Title.]

On motion of the —— and argument of council [*or, reasonable notice to the ——*], it is hereby ordered that the order made by the Court of Common Pleas in this case dissolving the injunction be, and is hereby, suspended and stayed, by virtue of the appeal and bond given, until the final hearing or further order in this court.

¹ See sec. 5228.

² Sec. 5225.

³ *Babcock v. Camp*, 12 Ohio St. 11. 3^d

156. (Sec. 5233, 82 O. L. 32.) *Order for new undertaking.*

[*Title.*]

It appearing to the court that the surety in the undertaking for the appeal in the case has removed from the state [*or otherwise become insufficient*], it is hereby, on motion, ordered that a new undertaking be given [*or change or renewal made, as the case may be*], with security to the approval of this court [*or, the clerk of this court*], within ——— days.

157. (Sec. 5233.) *Appeal dismissed for want of new undertaking.*

[*Title.*]

On motion to the court, and it appearing that the appellant has failed to comply with the order herein for a new undertaking on the appeal:

It is therefore considered by the court that said appeal be, and the same hereby is, dismissed.

157a. (Sec. 5235, 82 O. L. 32.) *Suspending execution of judgment for an injunction rendered by Common Pleas Court, in case of appeal.*

[*Title.*]

On motion of the ——— and argument of counsel, it is hereby ordered that the judgment rendered by the Court of Common Pleas in this case granting an injunction be, and hereby is, suspended and stayed by virtue of the appeal and bond given until final hearing or further order in this court.

158. (Sec. 5237.) *Judgment for plaintiff who fails to recover on his appeal more than in the court below.*

[*Title.*]

Use forms in Common Pleas with following addition:

And the plaintiff herein not recovering a greater sum than in the court below, it is ordered that he pay all the costs in this court.

159. (Sec. 5238.) *Penalty allowed when there was no reasonable ground for appeal, in case of money judgment.*

[*Title.*]

Enter judgment in the usual form, and add:]

And this judgment being substantially the same as was rendered by the court below, it is further adjudged that the appellant pay to the appellee as damages thereon five per cent of the judgment below, to wit, the sum of — dollars.

- 159a. (Sec. 5238.) *Same, in case of judgment other than for money.*

[*Title.*]

Enter judgment in the usual form, and add:]

And this judgment being substantially the same as was rendered by the court below, it is further adjudged that the appellant pay to the appellee as damages thereon the sum of — dollars.

160. (Sec. 5238.) *Penalty allowed when the appeal is for delay, in case of money judgment.*

[*Title.*]

Add to the usual judgment:]

And this judgment being substantially the same as was rendered by the court below, and the court further finding that this appeal was for the purpose of delay merely, it is therefore adjudged that the appellant pay to the appellee as damages thereon ten per cent of the judgment below, to wit, the sum of — dollars.

- 160a. (Sec. 5238.) *Same, in case of judgment other than for money.*

[*Title.*]

Add to the usual judgment:]

And this judgment being substantially the same as was rendered by the court below, and the court further finding that this appeal was for the purpose of delay merely, it is therefore adjudged that the appellant pay to the appellee as damages thereon the sum of — dollars.

161. (Sec. 5238.) *No penalty allowed.*¹

[*Title.*]

Add to the judgment:—And the court finding that there was reasonable ground for this appeal, no penalty is allowed.

162. (Sec. 5239.) *Entry remanding to Common Pleas Court.*

[*Title.*]

Add to the judgment entry:—It is further ordered that this case be remanded to the said Common Pleas Court of — county for execution [*or, for further proceedings*].

163. (Sec. 5239.) *Same—in decree for sale.*²

[*Title.*]

Enter judgment and order for sale, as in the Common Pleas; but, instead of the order that the sheriff or master report his proceedings to this court, order:

It is further ordered that this cause be remanded to the Common Pleas Court of — county, to carry this decree into execution, and for all further proceedings.

APPEAL FROM A JUSTICE OF THE PEACE TO THE COMMON PLEAS COURT—

For the time provided for filing pleadings in these appeals, see section 6598.

1st. *In case of appellant's failure to file transcript.*

164. (Sec. 6588.) *Case docketed on behalf of appellee, and judgment in Common Pleas.*

[*Title.*]

This day came the defendant [*or, plaintiff*] herein, and filed a transcript of the proceedings and judgment of H. M., a

¹This entry is not absolutely necessary, as no penalty will be taxed unless expressly allowed.

²The order for sale may issue out of the Circuit Court by sec. 5239, as amended, 82 O. L. 23, and all further proceedings be had there, in the same manner as in the Common Pleas. Or the case may be remanded and the order be issued out of the Common Pleas Court, the judgment and decree for sale being a final order. See *Teaff v. Hewitt*, 1 Ohio St. 511.

justice of the peace in and for ——— county, in a certain action between the above named parties, from which it appears that on the ——— day of ———, 18—, a judgment was rendered by said justice in favor of this ——— and against this ———, for the sum of \$——, and \$——, costs of suit; from which judgment the said ———, appealed.

And it appearing to the court that the appellant has failed to deliver a transcript of the proceedings and judgment aforesaid to the clerk of this court, and cause his appeal to be docketed within the time required by law, and the said C. D. now here electing to have judgment entered in this court:

It is therefore considered by the court that the said C. D. recover from the said A. B. the said sum of ——— dollars, the judgment, and ——— dollars costs of suit as aforesaid, with interest from [*same date as below*], together with his costs herein in this court expended, taxed at \$——; and execution is awarded therefor.

165. (Sec. 6588.) *Case docketed for appellee, and appeal dismissed.*

[*Title.*]

This day came the defendant [*or*, plaintiff] herein, and filed a transcript of the proceedings and judgment of H. M., a justice of the peace in and for ——— county, in a certain action between the above named parties, from which judgment the said plaintiff [*or*, defendant] appealed. And it appearing to the court that the appellant has failed to deliver a transcript of the proceedings and judgment aforesaid to the clerk of this court, and to cause his appeal to be docketed within the time required by law:

It is therefore, on motion, ordered that the said appeal be docketed on behalf of the appellee, and dismissed at the cost of the appellant; and that said cause be remanded to H. M., said justice, to be proceeded in as though no appeal had been taken.

2. *In case of plaintiff's failure to file petition after transcript filed.*

If the judgment before the justice was for the plaintiff, and, after appeal and transcript filed by the defendant, the plaintiff fails to file his petition, the case may be dismissed at plaintiff's cost.

If the judgment before the justice was for the defendant, and the plaintiff appeals and fails to file his petition, or otherwise fails to prosecute his appeal, judgment may be entered for the defendant for the amount of the judgment rendered against the plaintiff by the justice, together with interest and costs.¹ If the judgment for defendant was for his costs only, a dismissal of the case at plaintiff's cost, as above, is usually entered.

166. *Dismissal, for want of petition.*

[*Title.*]

This case is dismissed for want of petition, at plaintiff's cost, and execution is awarded.

167. (Sec. 6589.) *Judgment for defendant.*

[*Title.*]

This day came the defendant, and the plaintiff being in default for petition [*or, having otherwise neglected to prosecute his action to final judgment:*]

It is therefore considered that the defendant, C. D., recover from the plaintiff, A. B., the sum of ——— dollars, the judgment, with interest rendered by said justice, together with his costs herein expended: and execution is awarded.

3d. *In other cases.*

If the appeal is quashed for want of jurisdiction in the court appealed from, no judgment for costs can be rendered.²

If a case, on appeal, is dismissed for want of jurisdiction of the court of appeal, no judgment for costs can be rendered.³

168. (Sec. 6594.) *Judgment quashing an appeal.*

[*Title.*]

Now came the parties herein, and it appearing to the court that [*the cause must here be set forth*], on motion of the said ———, and due consideration had, it is ordered and adjudged that the said appeal be quashed, vacated, and held for void.

¹ Sec. 6589.

² *Paine v. Comm'rs, Wright*, 417.

³ *Norton v. McLeary*, 8 Ohio St. 210.

at the cost¹ of the ———, taxed at \$——; and execution is awarded therefor.

169. *Appeal dismissed for want of jurisdiction.*

[*Title.*]

On motion of the ———, and it appearing that this court has no jurisdiction herein, the petition is hereby stricken from the docket.

170. (Sec. 6595.) *Order for new undertaking.*

[*Title.*]

It appearing to the court that the surety in the undertaking for the appeal in this case is insufficient [*or, that the undertaking in this case is insufficient in form in this (state how), or in amount*], it is hereby, on motion, ordered that a new undertaking be given [*or change or renewal made, as the case may be*], with good security, and that this entry be certified to H. M., the justice of the peace from whose judgment this appeal was taken.

APPEAL FROM PROBATE COURT TO THE COURT OF COMMON PLEAS—

In cases of appeal from the Probate Court the order or judgment will be made as though the Common Pleas had original jurisdiction,² except that the formal part of the entry will be different. For form, see Entry No. 779.

APPEAL FROM COUNTY COMMISSIONERS TO THE COURT OF COMMON PLEAS—

Appeals from the county commissioners allowed by sec. 896, are only allowed in cases founded upon claims and demands against the county in its quasi corporate capacity.³

If judgment is rendered against the county commissioners for the payment of money, it may be in the following form :

¹ But see *supra*.

² See sec. 6407.

³ *Bowersox et al. v. Watson et al.*, 20 Ohio St. 506; *Shepard v. Comm'rs of Darke Co.*, 8 Ohio St. 357.

170a. (Sec. 896.) *Judgment on appeal from county commissioners.*

[*Title.*]

This cause came on this day to be heard and was submitted to the court on the pleadings and evidence; and on consideration thereof the court find on the issue joined for the plaintiff, and find that there is due him on the claim set up in his petition the sum of —— dollars.

It is therefore considered by the court that the plaintiff recover upon his said claim the said sum of —— dollars, together with his costs herein expended, and that the auditor of —— county issue his warrant upon the treasurer for payment of the same.¹

CHAPTER III.

EVIDENCE.

SUBDIVISION II. MEANS OF SECURING ATTENDANCE.

III. MODES OF TAKING TESTIMONY.

IV. ADMISSION AND INSPECTION OF DOCUMENTS.

V. VARIANCE.

SUBDIVISION II.—MEANS OF SECURING ATTENDANCE.

RULE—

171. (Sec. 5253.) Rule allowed.

172. Rule discharged.

173. (Sec. 5254.) Judgment on rule.

ATTACHMENT—

174. (Sec. 5254.) Order for.

175. Attachment discharged.

176. (Sec. 5253.) Judgment on attachment.

PROCEEDINGS AGAINST, AND PUNISHMENT OF, WITNESS—

177. (Sec. 5254.) When witness refuses to be sworn, etc.

178. (Sec. 5255.) Discharge from imprisonment, etc.

¹ See sec. 1024, and *Comm'rs of Clermont Co. v. Robb et al.*, 5 Ohio, 490.

TESTIMONY OF PRISONER—

179. (Sec. 5257.) Order for oral.

It is doubtful whether, in any case, a party, where he is sworn and testifies as a witness in his own behalf, can recover fees. To authorize the allowance, he should be required to show that he did not attend as a party, nor attend to the conduct of the trial of the cause; and that the sole purpose and intent of his attendance was as a witness.¹

RULE—

171. (Sec. 5253.) *Rule allowed.*

[*Title.*]

On motion of —'s attorney, a rule is allowed to issue against E. F., commanding him to appear forthwith [*or at any specified time*], as a witness in this case, and to show cause why he should not be attached for contempt in disobeying the subpœna of this court.

172. *Rule discharged.*

[*Title.*]

And now the said E. F. having appeared, and having been examined touching his disobedience of the subpœna of the court in this case, on consideration thereof:✽ it is ordered that said rule be discharged at the cost of the —.

173. (Sec. 5254; 77 O. L. 45.) *Judgment on rule.*

[*Title.*]

As in last to ✽, and continue:—the court do find that he has been thereby guilty of a contempt.

It is therefore ordered that a fine of \$—— be imposed upon the said E. F., for this, his said contempt, and that he pay the costs of the proceedings under this rule; for both of which execution is awarded.

ATTACHMENT—

If the witness has been served personally by subpœna, or on rule, and has disobeyed the same, an order for attachment may be had.

¹ Logan v. Thomas et al., 11 How. 160.

174. (Sec. 5253.) *Order for attachment.*[*Title.*]

On motion of the attorney for the —, it is ordered that an attachment issue herein, commanding the sheriff to arrest and bring E. F. before this court forthwith [*or at any specified time*], to give his testimony in this case, and to answer for his contempt in disobeying the subpoena [*or, rule*] of the court.

If the order is to appear at some future time, the court may also add:—

And the court fix the undertaking of the said E. F. for his appearance at §——.

175. *Attachment discharged.*[*Title.*]

Now came the said E. F., in charge of the sheriff, upon the attachment heretofore issued against him, and the court having examined the said E. F. [*or, heard the evidence*] touching his alleged contempt, do, on consideration * thereof, order that said attachment be discharged at the cost of —.

176. (Sec. 5254; 77 O. L. 45.) *Judgment on attachment.*[*Title.*]

*As in last to *, and continué:—*find that the said E. F. is guilty of the same.

It is therefore ordered that a fine of §—— be imposed upon the said E. F. for this, his said contempt, and that he pay the costs of these proceedings, for both of which execution is awarded.

PROCEEDINGS AGAINST, AND PUNISHMENT OF, WITNESS—

177. (Sec. 5254; 77 O. L. 45.) *When witness refuses to be sworn, etc.*[*Title.*]

And now E. F., a witness in this action, having been called upon therefor, and having refused, as such witness, to be sworn [*or, to answer the following question propounded to*

him, to wit (*state question*¹), or, to subscribe his deposition taken herein]; and having been personally examined touching his said refusal, on consideration thereof, the court do find that he is thereby guilty of a contempt of court.

It is therefore ordered † that a fine of \$—— be imposed upon the said E. F. for this, his said contempt, and that he pay the cost of this proceeding; for both of which execution is awarded.

Or, † that the said E. F. be imprisoned in the jail of this county, there to remain until he shall submit so to be sworn [*or, testify, or, subscribe said deposition*]; or be otherwise duly discharged.

178. (Sec. 5255.) *Discharge from imprisonment in certain case.*
[*Title.*]

In this cause the application of E. F., by his attorney, for discharge from imprisonment being heard before me, I do find that the imprisonment of the said E. F., made by order of ——, before whom his deposition was being taken, is illegal, and therefore order that the said E. F. be forthwith discharged from said imprisonment.

TESTIMONY OF PRISONER—

179. (Sec. 5257.) *Order for oral testimony.*
[*Title.*]

On motion of the ——, and it being necessary to have the oral testimony in this case of one E. F., now confined in the jail of —— county, it is hereby ordered that the sheriff of said county produce said prisoner for such oral examination before this court, on the —— day of ——, 18—, at the hour of —— o'clock, — M.

SUBDIVISION III.—MODES OF TAKING TESTIMONY.

180. (Sec. 5272.) Commission to take depositions.

181. (Sec. 5286.) Exceptions sustained.

182. (Sec. 5286.) Exceptions overruled.

¹So that it may be stated in the order of commitment, as required by section 5256.

180. (Sec. 5272.) *Commission to take depositions.*

[*Title.*]

On motion of the — herein, it is ordered that a commission be granted to issue to G. H., of the county of —, and State of —, authorizing and requiring him to take the deposition of [*give name and residence*], upon the written interrogatories herein filed, and to return the same to this court without unnecessary delay. And it is ordered that proper notice of the time and place thereof be given to the respective parties.

181. (Sec. 5286.) *Exceptions sustained.*

[*Title.*]

This cause being this day heard upon the exceptions of the — to the deposition of —, taken in the case, the court, on consideration of the premises, find * said exceptions well taken, and do sustain the same by reason of the defects therein mentioned. It is therefore, on motion, ordered by the court that the said deposition be stricken from the files of this case.

182. (Sec. 5286.) *Exceptions overruled.*

[*Title.*]

As in last to, and continue:]*—that the said exceptions are not well taken, and they are therefore overruled.

SUBDIVISION IV.—ADMISSION AND INSPECTION OF DOCUMENTS.

183. (Sec. 5289.) Order to produce writing.

184. (Sec. 5289.) Order to produce books, etc.

185. (Sec. 5289.) Order to produce, upon trial.

186. (Sec. 5290.) Order for examination out of court.

187. (Sec. 5291.) Order for private examination.

188. (Sec. 5293.) Order for discovery.

Secs. 5289, et seq., evidently authorize the court to make an order for the production of books, etc., either before or on the day of trial, as the order may be made in cases and under circumstances where it

might heretofore be made by a court of chancery,¹ and courts of chancery formerly exercised such power.²

The books, to be produced, were formerly left with an officer of the court,² unless, for the convenience of the party producing them, some other place was designated; and the same should be done under the code.

183. (Sec. 5289.) *Order to produce writing.*

[*Title.*]

On motion of the plaintiff, and due notice given, and it appearing that the defendant has in his possession a certain account between himself and said plaintiff, which is of importance to plaintiff as evidence in this case, it is hereby ordered that he produce the same, etc. [*Conclude as in any of the following entries concerning the production of books, according to circumstances.*]

184. (Sec. 5289.) *Order to produce books, etc.*

[*Title.*]

On motion of the —, and due notice being given, it is hereby ordered that the said — do, within — days from the service of this order, produce and leave with the clerk of this court certain books in his possession, to wit [*specify particularly*]: with liberty to the said — and his attorney to examine the same, and take copies and abstracts thereof.

185. (Sec. 5289.) *Order to produce upon trial.*

[*Title.*]

On motion of the plaintiff, and due notice being given, it is hereby ordered that the said defendant do, upon the trial of this case, produce certain books in his possession, to wit: [*specify particularly*], in open court, for examination and use at said trial.

186. (Sec. 5290.) *Order for examination out of court.*

[*Title.*]

On motion of the plaintiff, and due notice given, it is hereby ordered that the said plaintiff and his attorney be al-

¹ See *Baggott v. Goodwin*, 17 Ohio St. 81.

² 2 Daniels' Ch. Pl. and Pr. 1389.

lowed, at all reasonable times, to examine, at the office of the said defendant, certain books in his possession, to wit [*specify*]: with liberty to take copies and abstracts thereof.

187. (Sec. 5291.) *Order for private examination.*

[*Title.*]

The — herein having demanded the production [*or*, inspection, *or*, copy] of certain books [*or*, papers, writings, *or*, documents], and the — alleging that the same are of such a character that they ought not to be produced [*or*, that an inspection, *or*, copy, ought not to be allowed], it is therefore, on motion of the said —, ordered and directed that a private examination thereof be made by G. H., a master commissioner of this court, and that he report to this court, according to statute, without unnecessary delay.

188. (Sec. 5293.) *Decree for discovery.*

[*Title.*]

Now came the plaintiff, by his attorney, and thereupon this cause came on to be heard upon the petition for discovery, and the interrogatories contained therein. And the defendant not demurring thereto,¹ the court find that the plaintiff is entitled to the discovery prayed for in his petition.

It is therefore ordered and adjudged that the defendant be, and he hereby is, required, within — days, to make and file full and direct answers in writing, under oath, to the interrogatories in said petition set forth.

When the answer is made and filed, the case may then be finally disposed of, costs to be paid as the court may direct.

SUBDIVISION V.—VARIANCE.

189. (Sec. 5294.) Amendment allowed in case of material variance.

190. (Sec. 5295.) Amendment allowed in case of immaterial variance.

Sections 169 and 170 (5294 and 5295, Ohio Code) contemplate a

¹ Or, if the demurrer is heard and overruled, enter the overruling in the usual form, and continue as in the balance of this entry.

case where the alleged variance has been discovered or is developed on the trial or hearing, at which time the relief, in a case to which it is appropriate, may at once be given, and the trial thereafter proceed upon the amended pleadings.¹

If the objection is not made at the trial, it is too late on error to make it.²

189. (Sec. 5294.) *Amendment allowed in case of material variance.*

[*Title.*]

This cause coming on this day for trial, and it being found that there is a variance between the pleading of the plaintiff and the proof adduced, and that the defendant has been misled thereby to his prejudice in making his defense, the court find said variance to be material; and the cause is continued at the cost, for the present term, of the plaintiff. And, on motion, the plaintiff has leave to amend his petition within — days.

Or, such other terms may be imposed as are just and proper. Or, by consent of parties, the trial may proceed upon the amended pleadings, if filed instanter.

190. (Sec. 5295.) *Amendment allowed in case of immaterial variance.*

[*Title.*]

This cause coming on this day for trial, and there appearing to be a variance between the pleading of the plaintiff and the proof adduced, but it appearing that the defendant has not been misled thereby to his prejudice in making his defense, the court find said variance not to be material, and thereupon the trial proceeds, and the plaintiff is allowed to amend his petition at once to conform the same to the facts found by the evidence. And said amendment is now accordingly filed.

¹ Egbert v. Wicker, 10 How. 197.

² Dayton v. Kelly, 24 Ohio St. 345.

CHAPTER IV.

EXCEPTIONS.

191. (Sec. 5300.) Exception, etc., noted.
 192. (Sec. 5302.) Order allowing bill of exceptions.
 193. (Sec. 5304.) Exception withdrawn.

No exception need be taken to a final judgment.¹

A *nunc pro tunc* order, made at a subsequent term, to the effect that a paper not identified by the bill shall be considered as a part of it, is a nullity.²

Where a bill of exceptions stated that a certain paper, which was still found in the file of the case, and as to the identity of which there could be no doubt, was attached as part of the bill of exceptions, and marked with the letter A, but, in fact, it was not done, the court ordered the bill of exceptions to be amended by attaching the paper.³

A bill of exceptions must be made a part of the record, or it can not be considered by the court of errors.⁴

In case of a motion for a new trial, after judgment, being overruled, exception taken and a bill of exceptions allowed, filed, etc., it is sometimes entered up in one entry. But it is better practice to make separate entries; one overruling the motion and noting exception, and another allowing the bill.

191. (Sec. 5300.) *Exception noted to decision entered on the record.*

[*Title.*]

Add to the journal entry :]—And to the said order [*or, finding*] of the court the plaintiff [*or, defendant*], by his counsel, excepts.

192. (Sec. 5302; 87 v. 206.) *Order allowing bill of exceptions.*
 [*Title.*]

Now comes the —, and presents to the court his certain bill of exceptions herein, which, being found by the court to

¹ Commercial Bank v. Buckingham, 12 Ohio St. 402.

² Busby v. Finn, 1 Ohio St. 409.

³ Haselwood v. Parker, 3 L. G. 49.

⁴ Baldwin v. The State, 6 Ohio, 15.

be true, is allowed, signed, and sealed, and, on motion, is hereby made part of the record of this case.

193. (Sec. 5304.) *Exceptions withdrawn.*

[*Title.*]

Now comes the —, and, by leave of court, withdraws from the files his exceptions heretofore taken herein.

CHAPTER V.

NEW TRIAL.

ON MOTION MADE WITHIN THE TERM—

194. (Sec. 5305.) Motion granted after verdict.

195. (Sec. 5305.) Motion granted after report of referee.

195a. (Sec. 5305.) Motion granted after decision by the court.

195b. (Sec. 5305.) Motion for new trial overruled.

ON PETITION AFTER THE TERM—

196. (Sec. 5309.) Judgment for a new trial—where final judgment has not been entered.

196a. (Sec. 5309.) Judgment adverse to new trial.

In cases tried by jury or referee, the motion for a new trial, except for reason of newly-discovered evidence, is made before judgment is entered on the verdict or report, three days being allowed for that purpose. So in cases where the court makes its finding on a day before entering judgment the motion will be filed before judgment. In any of these cases, upon motion being filed, the entry of judgment is withheld until the motion is decided. But in a case tried by the court, if the finding and judgment are entered at the same time, as is usually the case, the motion and entry will be to set aside the judgment and for a new trial. The fact that judgment has been entered will not preclude a new trial being allowed under section 5305.

ON MOTION MADE WITHIN THE TERM—

194. (Sec. 5305.) *Motion granted after verdict.*

[*Title.*]

This cause being heard on the motion for a new trial, the

court, on consideration thereof, grant the same; and the verdict is hereby vacated and a new trial granted.

195. (Sec. 5305.) *Motion granted after report of referee.*
[Title.]

See Entries Nos. 140 and 141.

195a. (Sec. 5305.) *Motion granted after decision by the court.*
[Title.]

This cause being heard on the motion [to set aside the judgment and] for a new trial, the court, on consideration thereof, grant the same; and the [judgment and] finding of the court [are] is accordingly set aside, and a new trial is granted.

For entry of motion overruled and judgment on verdict, see No. 252. For motion overruled and judgment on report of referee, Nos. 137 and 139. For motion overruled and judgment after decision by the court, No. 197b.

195b. (Sec. 5305.) *Motion for new trial overruled.*
[Title.]

This cause being heard on the motion [to set aside the judgment] and for a new trial, the court, on consideration, overrule the same.

ON PETITION AFTER THE TERM—

The following entry is for a case where judgment has not been entered by the court on the verdict, report of referee, or its own decision. If such judgment has been entered, use Entry No. 270, *post*.

196. (Sec. 5309.) *Judgment for a new trial in a case where final judgment has not been entered.*
[Title.]

This cause now coming on for hearing upon the petition for a new trial in case numbered — of this court and the evidence, the court find that the grounds for a new trial set up in said petition are such as could not with reasonable diligence have been discovered at the term when the verdict [or,

report; *or*, decision] in said case was given [*or*, made], and that, by reason of the facts so set up, the plaintiff is entitled to a new trial of said cause.

It is therefore adjudged that the verdict [*or*, report of the referee; *or*, decision of the court] in the case above named, wherein the said A. B. is plaintiff and C. D. is defendant, be, and it hereby is, vacated, and a new trial of said cause is granted.

It is further considered that the costs in this case abide the result of said case No. — [*or other order as the court may make*].

196a. (Sec. 5309.) *Judgment adverse to a new trial.*

[*Title.*]

This cause now coming on for hearing upon the petition for a new trial in case No. — of this court, wherein the said A. B. is plaintiff and C. D. defendant, the court finds upon the evidence adduced that the plaintiff herein is not entitled to the new trial petitioned for, and therefore refuses the same. And it is adjudged that the defendant recover from the plaintiff his costs herein expended.

DIVISION IV.—JUDGMENT.

CHAPTER I. JUDGMENT IN GENERAL.

II. JUDGMENT UPON FAILURE TO ANSWER.

III. JUDGMENT BY CONFESSION.

IV. MANNER OF GIVING AND ENTERING JUDGMENT.

V. JUDGMENT FOR COSTS AND ITS ENFORCEMENT.

VI. NEW TRIAL AND OTHER RELIEF AFTER JUDGMENT.

VII. REVIVOR OF, AND NEW PARTIES TO JUDGMENT.

CHAPTER I.

JUDGMENT IN GENERAL.

JUDGMENT ON FINDING PREVIOUSLY MADE BY THE COURT—FORMS—

- 197. Judgment on finding when no motion for new trial has been made.
- 197a. Same—for defendant.
- 197b. Motion for new trial overruled, and judgment on finding.

FORMS OF JUDGMENT—

- FINDING I. On submission of issue triable only by the court.
- FINDING II. On submission to the court, jury waived.
- FINDING III. General finding by the court on issue joined.
- FINDING IV. For judgment taken on defendant's default.
- 198. (Sec. 5311.) For plaintiff, in action for money only.
- 199. (Sec. 5311.) For one of several plaintiffs.
- 200. (Sec. 5311.) For plaintiff against one of several defendants.
- 201. (Sec. 5311.) For plaintiff against one defendant and for another.
- 202. (Sec. 5311.) For plaintiff by default against one defendant, and on submission against another.
- 203. For plaintiff, for amount admitted by answer—balance waived.
- 204. Same—case continued as to balance.
- 205. For plaintiff for balance, after admitting counterclaim.
- 206. (Sec. 5311.) For defendant, for costs.
- 207. (Sec. 5311.) For one of several defendants.
- 208. (Sec. 5311.) For defendant against one of several plaintiffs.
- 209. For defendant, on petition and counterclaim.
- 210. (Sec. 5315.) For defendant on counterclaim or set-off, after petition dismissed.
- 210a. (Sec. 5329.) For defendant for balance due on counterclaim, etc.

JUDGMENT OF DISMISSAL—

- 211. For want of jurisdiction.
- 212. (Sec. 5313.) For neglect in serving other defendants.
- 213. (Sec. 5314, 1.) Dismissal without prejudice—by plaintiff.
- 214. (Sec. 5314, 2.) Dismissal for want of prosecution.
- 215. (Sec. 5314, 3.) Dismissal for want of necessary parties.

SALE OF MORTGAGED PROPERTY—

- PREFACE I. For a decree for sale of mortgaged premises after trial on pleadings.
- PREFACE II. For a decree for sale of mortgaged premises on defendant's default.

DECREES FOR SALE—

216. (Sec. 5316.) Amount found due to plaintiff [with personal judgment], and decree for sale—no cross-petitioner.
217. (Sec. 5316.) Amount found due to plaintiff and cross-petitioner [with personal judgment], and decree for sale—when all the notes are secured by one mortgage.
218. (Sec. 5316.) Same—when notes are secured by several mortgages.
219. (Sec. 5316.) Decree finding part of several notes due [personal judgment], and decree for sale.
220. (Sec. 5316.) Decree foreclosing mortgage given to indemnify, etc., and ordering sale.
221. Decree finding a deed and lease back a mortgage, and for foreclosure.
222. (Sec. 5316.) Order to subdivide.
223. (Sec. 5317.) When property situated in more than one county—order that sheriffs of respective counties sell.
224. (Sec. 5317.) One officer directed to sell the whole.

CONFIRMATION AND DISTRIBUTION—

225. Decree of confirmation, order for deed and distribution.
226. Personal judgment for balance remaining due.
227. Execution awarded for balance remaining due.
228. Confirmation and distribution, in case of part of several notes.

BUILDING ASSOCIATION DECREES—

229. Decree for sale.
230. Confirmation and distribution.

A judgment is the final determination of the rights of the parties in an action.¹

A decree is defined to be the judgment or sentence of a court of equity, either interlocutory or final; and as the code abolishes the distinction between law and equity proceedings, the term “decree” is scarcely recognized. The form is preserved without the name.²

The distinguishing characteristic of a judgment is its finality. Nothing more must remain that requires the action of the court, except to carry into effect the rights of parties fixed by the judgment.³

The judgment may be analyzed into three parts—the formal preface,

¹ Code, sec. 5310.

² See *The State v. McArthur*, 5 Kan. 280.

³ *Kelly v. Stanberry*, 13 Ohio, 421.

the finding, and the adjudication or mandatory part. In every case each should be distinctly formed, either in the same or in separate entries.

The formal preface should made a clear statement of the pleadings and evidence upon which the case has been submitted. In ordinary judgments a general statement is sufficient. A more particular statement is often advisable, as in decrees for sale of real estate, etc., and where there are numerous parties, and various interests represented by different parties, set it out in separate answers and cross-petitions. In such cases, it is customary to enumerate the various pleadings upon which the case has been considered.

The finding has already been considered in a previous chapter.

The language of the judgment is, "It is considered," *Consideratum est per curiam*, implying that the judgment is rather the sentence of the law pronounced by the court than the decision of the court.¹ It must follow the pleadings, and respond to all issues.²

In entering judgment, interest is calculated in some courts to the first day of the judgment term, and in others up to the first day judgment is entered, except that in judgment by confession, and in a suit brought within the judgment term, it is always calculated to the day of the judgment.³ The judgment bears interest at the same rate as the note without any rests, whether there were rests in the note or not.⁴ The plaintiff is also entitled to add the cost of protest of notes executed out of, but not of those executed within, the state. The judgment will also be for costs, and the costs being in blank will not make it irregular.⁵

Any agreements between parties as to operation of the judgment, other than what the law would impose, should be carefully incorporated in the judgment, as by consent or order of court.

If one or more of several defendants shall have been served, but not all of them, the entry giving judgment against the party served should also dispose of the parties not served, so that there may be no doubt as to their standing in the case. If they are not wanted further, the action should be dismissed as to them; if otherwise, it should be continued for further service.

There is no necessity, ordinarily, for adding an award of execution to a judgment. See EXECUTION.

¹ Bouvier's Law Dictionary.

² Williams v. Directors, etc., W. 518.

³ Kimbal v. Connally, Scioto District Court, 1859, 1 W. L. M. 402.

⁴ Marietta Iron Works v. Lottimer, 25 Ohio St. 621.

⁵ Linton v. Housh, 4 Kan. 535.

JUDGMENT ON FINDING PREVIOUSLY MADE BY THE COURT: FORMS.

As heretofore stated, it is customary to enter finding and judgment at the same time in cases where the trial is had before the court. If, however, a party desires to enter finding only, forms will be found beginning with Entry No. 129. When such finding has been entered, judgment may be entered up on the finding as on a verdict of a jury. If no motion for a new trial is made, or if made and overruled, judgment will be entered on the findings.

197. *Judgment on finding, when no motion for a new trial has been made.*

[Title.]

This court having heretofore found that the — in this case was indebted to the — in the sum of — dollars, and no motion for a new trial having been made;

It is therefore considered that the said — recover from the said — the said sum of — dollars and his costs herein expended.

197a. *Same, for defendant.*

[Title.]

The court having heretofore found in this case for the defendant, and no motion for a new trial being made;

It is therefore considered by the court that the said defendant go hence without day and recover from the plaintiff his costs herein expended.

197b. *Motion for a new trial overruled and judgment on finding.*

[Title.]

This cause now coming on for hearing on the motion of the — for a new trial, the court, on consideration, overrules the same.

†It is therefore considered by the court that the said — recover from the said — the said sum of — dollars, as heretofore found due him, together with his costs herein expended.

Or, if for defendant:]

†It is therefore considered by the court, that the said defendant go hence without day and recover from the said plaintiff his costs herein expended.

FORMS OF JUDGMENT—

When the finding and judgment of the court are made and entered at the same time, the preface or formal part in the several kinds of judgment are very similar, and need not be repeated in all the forms given here. The findings are given as formulæ to be prefixed to the several judgments according to circumstances. Finding No. I is for a judgment on submission to the court in a case where the issue could not be tried by a jury. Finding No. II for a judgment on submission where a jury has been waived; and Finding No. III may be used in either case, being a general finding which may be used by the clerk or party without stopping to consider whether the case was primarily a jury case or not.

FINDING I.—*For judgment on submission of an issue triable only by the court.*

[*Title.*]

This cause coming on this day for hearing, was submitted to the court upon the pleadings [*or they may be particularly named*] and the evidence, and on consideration thereof, the court find * on the issue joined for the plaintiff [*or, defendant*].

FINDING II.—*For a judgment on submission to the court—jury waived.*

[*Title.*]

This cause coming on this day for hearing, and a jury being waived, was submitted to the court upon the pleadings [*or they may be particularly named*] and the evidence, and on consideration thereof, the court find * on the issue joined for the plaintiff [*or, defendant*].

Or, the clerk, without determining to which of the above classes an action belongs, may use a general formula in entering judgments on submission to the court, as follows :

FINDING III.—*General finding by the court on issue joined.*

[*Title.*]

This cause coming on this day for hearing, was submitted to the court upon the pleadings and evidence, without the intervention of a jury; on consideration whereof, the court find * on the issue joined for the plaintiff [*or, defendant*].

For convenience of future reference, the Finding for plaintiff on defendant's default, from page 124, is also placed here.

FINDING IV.—*For judgment taken on defendant's default.*

[*Title.*]

Now comes the plaintiff, by his attorney, and the defendant being in default for answer and demurrer, the court find* that the allegations of the petition are confessed by him to be true.

198. (Sec. 5311.) *Judgment for plaintiff in an action for money only.*

[*Title.*]

Find as in one of the above findings, according to circumstances, and continue:]—and find that the defendant C. D. is indebted to the plaintiff A. B. in the sum of \$——.

It is therefore considered by the court that the said plaintiff recover from the said defendant the said sum of —— dollars, and his costs¹ herein expended, taxed at \$——.

199. (Sec. 5311.) *Judgment for one of several plaintiffs.*

[*Title.*]

Finding page 99, and continue:]—A. B., as between him and the said defendant, and that the defendant C. D. is indebted to the said A. B. in the sum of —— dollars.

It is therefore considered that the said A. B. recover from the defendant the said sum of \$——, and his costs herein expended. And as to the plaintiff R. T. the court find that he has no claim against the defendant, and, as to him, the petition is dismissed.

200. (Sec. 5311.) *Judgment for plaintiff against one of several defendants.*

[*Title.*]

Find as on page 99, and continue:]—as against the de-

¹ If the recovery be less than one hundred dollars, judgment for the plaintiff's costs can not be rendered, unless the amount of the plaintiff's claim is found by the jury to be more than one hundred dollars, and is reduced, by the allowance of a counterclaim or set-off, to less than one hundred dollars. *Brunaugh v. Worley*, 6 Ohio St. 597. See sec. 5349.

fendant, B. C., impleaded herein, and find that said B. C. is indebted to the said plaintiff in the sum of — dollars.

It is therefore considered that the plaintiff, A. B., recover from the said defendant, B. C., the said sum of \$—, and his costs herein expended. And as to the other defendants, the action is continued¹ [*or, dismissed*].

201. (Sec. 5311.) *Judgment for plaintiff against one defendant, and judgment for another.*

[*Title.*]

Find as on page 99, and continue:] — as against the defendant, S. T., and that said defendant is indebted to plaintiff in the sum of — dollars. And as against the defendant, M. N., the court find the plaintiff has no cause of action on the petition herein.

It is therefore considered that the plaintiff, A. B., recover from the said defendant, S. T., the said sum of — dollars, and his costs in this behalf expended; and that the said defendant, M. N., go hence without day, and recover from the plaintiff his costs herein expended.

202. (Sec. 5311.) *Judgment for plaintiff by default against one defendant, and on submission against another.*

[*Title.*]

This cause came on for hearing on the petition, the answer of the defendant, C. D., and the evidence, the defendant, E. F., being in default for answer and demurrer, and was submitted to the court without the intervention of a jury: on consideration whereof, the court find, on the issue joined between the plaintiff and the defendant, C. D., for the said plaintiff, and find the allegations of the petition confessed as against the defendant, E. F.; and that said defendants are indebted to plaintiff in the sum of \$—.

It is therefore considered that the said plaintiff recover from the said defendants the said sum, etc.

¹ Whenever a several judgment is proper. Sec. 5312.

203. *Judgment for plaintiff for amount admitted by answer—
balance waived.*

[*Title.*]

And now the defendant having, by his answer filed herein, admitted his indebtedness to the plaintiff in the sum of \$——, and the plaintiff now waiving further claim against said defendant:

It is therefore, on motion of the plaintiff, considered that he recover from the defendant, C. D., the said sum of —— dollars so admitted to be due, together with his costs herein expended.

204. *Same—and case continued as to balance.*

[*Title.*]

And now the defendant having, by his answer filed herein, admitted his indebtedness to the plaintiff in the sum of \$——, it is therefore considered by the court that the plaintiff, A. B., recover from the defendant, C. D., the said sum of —— dollars so admitted to be due, together with his costs in this behalf expended. And as to the balance of plaintiff's claim, the case is continued.

205. *Judgment for plaintiff for balance, after admitting counter-
claim.*

[*Title.*]

And now the defendant, by his answer filed herein, not having denied the claim of the plaintiff, but having set up a counterclaim for an amount less than the claim of the plaintiff, to wit, for the sum of —— dollars, and the plaintiff admitting said counterclaim in open court:

It is therefore, on motion of the said A. B., considered that he recover from the defendant, C. D., the sum of —— dollars, the excess of his, the said plaintiff's, claim, together with his costs herein expended.

206. (5311.) *Judgment for defendant for costs.*

[*Title.*]

Find for defendant, as in one of the Findings on page 99, and continue:]

It is therefore considered by the court that the defendant,

C. D., go hence without day, and recover from the plaintiff, A. B., his costs herein expended.

207. (Sec. 5311.) *Judgment for one of several defendants.*

[*Title.*]

And now this cause coming on to be heard on the petition, the answer of L. M. [*name any other pleadings*] and the evidence, the court being fully advised in the premises, find that as against the said defendant, L. M., impleaded herein, the plaintiff has no cause of action.

It is therefore considered that the said L. M. go hence without day, and recover from the plaintiff his costs herein expended.

208. (Sec. 5311.) *Judgment for defendant against one of several plaintiffs.*

[*Title.*]

Find for defendant, as on page 99, and continue:]—as against the plaintiff, R. S.

It is therefore considered that as to said plaintiff, R. S., this petition be dismissed, and that the defendant recover from said plaintiff, R. S., his costs in this behalf expended.

209. *Judgment for defendant, on petition and counterclaim.*

[*Title.*]

This cause coming on for hearing on the petition, the counterclaim and the answer thereto, and the evidence, was submitted to the court without the intervention of a jury; on consideration whereof, the court find that the plaintiff has no cause of action, as claimed in his petition, and that upon the counterclaim herein he is indebted to defendant in the sum of — dollars.

It is therefore considered by the court that the defendant recover from the plaintiff the said sum of \$—— and his costs herein expended.

210. (Sec. 5315.) *Judgment for defendant on counterclaim or set-off, after petition dismissed.*

[*Title.*]

And now the plaintiff herein having dismissed his petition, this cause came on for hearing on the set-off [*or, counterclaim*] of the said defendant, the other pleadings and the evidence, and was submitted to the court without the intervention of a jury: on consideration whereof, the court finds on the issue joined for the defendant, and finds that plaintiff is indebted to him in the sum of \$——.

It is therefore considered that the defendant recover, etc.

210a. (Sec. 5329.) *Judgment for defendant for balance due on counterclaim or set-off.*

[*Title.*]

*Find as in one of the findings on page 99, according to circumstances, to *, and continue:]*—that there is due to the plaintiff from the defendant on the claims in his petition set up the sum of —— dollars, and that there is due to the defendant from the plaintiff upon the cause of action set up in his counterclaim [*or, set-off*] the sum of \$——.

It is therefore considered by the court that the defendant recover from the plaintiff the balance so found to be due him, to wit, the sum of —— dollars, and his costs herein expended.

JUDGMENT OF DISMISSAL—

Where a case is dismissed for want of jurisdiction of the subject-matter, the court can only strike the case from the docket, and can render no judgment for costs.¹ In other cases mentioned in section 5314, state the cause of dismissal, and if costs have been paid out by the party in whose favor the case is dismissed, he may recover them by a judgment annexed to the dismissal.

An order dismissing a case for defect or irregularity of process, or in the service of process, and in no way founded on, or passing upon, the

¹ Norton v. McLeary, 8 Ohio St. 205.

allegations of the parties in their pleadings, is not a final judgment.¹ But otherwise, a judgment of dismissal and for costs, though without prejudice, is a final judgment.²

A plaintiff, after an answer amounting to a counterclaim has been filed, can not dismiss the action.³

211. *Dismissal for want of jurisdiction.*

[*Title.*]

On motion of the defendant, and it appearing that this court has no jurisdiction of the subject-matter of this action, the case is hereby stricken from the docket.

212. (Sec. 5313.) *Dismissal for neglect in serving other defendants.*

[*Title.*]

On motion of the defendant, C. D., and it being shown to the court that the plaintiff has neglected for an unreasonable time to serve summons herein on E. F., co-defendant herein, it is ordered that the petition be dismissed at plaintiff's cost, as for want of prosecution [but without prejudice to a future action.⁴]

213. (Sec. 5314, 1.) *Dismissal without prejudice—by plaintiff.*

[*Title.*]

Now comes the plaintiff, and dismisses this action at his own cost without prejudice to a future action.

214. (Sec. 5314, 2.) *Case dismissed for want of prosecution.*

[*Title.*]

This cause being this day called for trial, and the plaintiff failing to appear in person or by attorney, the action is hereby dismissed at plaintiff's cost without prejudice to a future action.

¹ Evans v. Hes, 7 Ohio St. 233.

² Philips v. Mustard, 3 W. L. M. 141.

³ Wiswell v. First Con. Ch., 14 Ohio St. 31.

⁴ May be added by sec. 5314, 4.

215. (Sec. 5314, 3.) *Case dismissed for want of necessary parties.*

[*Title.*]

On motion of —, and it being shown to the court that N. P. is a necessary party plaintiff [*or*, defendant] to this action, and that he has not been made a party, the petition is hereby dismissed at plaintiff's cost without prejudice to a future action.

For entries under other subdivisions of section 5314, see—

4. Entry No. 212.

5. Entry No. 267.

6. For form of vacation entry, see page 9, under which make dismissal as in Entry No. 213.

For judgment under section 5315, see Entry No. 210.

SALE OF MORTGAGED PROPERTY—

The power of courts to appoint special masters for the sale of specific real property, is not taken away by the code, nor is it essential, unless required by the order of the court, that such special master give bond or take an oath of office.¹

Section 5021 provides that, when the plaintiff asks it in his petition, a judgment for the money due may be rendered as in other cases for the recovery of money only. This judgment of course has all the effect of any other personal judgment, and execution may issue on it in addition to the order for sale.² But where, without a personal judgment being taken or asked, a decree in chancery merely finds the amount due, and subjects certain securities to be sold for its satisfaction, it is not a decree for the remainder of the debt after the securities are exhausted, nor can execution be issued for the unpaid balance.³

¹ *Mayer v. Wick*, 15 Ohio St. 548.

² In an action to obtain judgment on a promissory note secured by mortgage, and to foreclose the mortgage, judgment should be rendered on the note, and an order made for the sale of the mortgaged premises. *Howlett v. Martin*, 3 Law G. 266.

The holder of a note secured by mortgage may, in a single action, under the act of February 19, 1864 (S. & S. 575; sec. 5021), have a judgment against all the makers of the note, and a sale of the mortgaged premises, although the mortgage is executed only by a part of the makers of the note. *King v. Safford*, 19 Ohio St. 587.

But a personal judgment can not be taken, unless the petition contains a prayer for such judgment. *Giddings v. Barney*, 31 Ohio St. 80.

³ *Hamilton v. Jefferson*, 13 Ohio, 417.

But even in such a case the decree may be so framed, when personal service on the defendant has been had, that after the mortgaged property has been exhausted execution may be had on the decree for the balance remaining due as upon judgment at law, as given after Entry No. 227.¹

As to remanding case to the Common Pleas when the decree for sale is entered in the District Court, see Entry No. 163, and note.

Also for other entries applicable to cases of sale of real estate, see under EXECUTION.

The decree for sale may of course be entered either after a trial of the issues made by pleadings or on the default of the defendant. For convenience the forms in both cases are given in this place, and a finding for each is given to be used as a preface to any of the subsequent decrees.

PREFACE I.—*For a decree for sale of mortgaged premises after trial on pleadings.*

[*Title.*]

This cause now coming on for hearing, was submitted to the court on the pleadings, [*or specifically name the pleadings, thus:* on the petition, the answer of the defendant, C. D., and the answer and cross-petition of the defendant, E. F., and the reply to the answer of C. D.], and the evidence, and, on consideration thereof, the court find on the issue joined for the plaintiff.

PREFACE II.—*For a decree for sale of mortgaged premises on defendant's default.*

[*Title.*]

This cause now coming on for hearing on the petition [of the plaintiff, the cross-petition of the defendant, E. F.] and the evidence, the court find that the defendant, C. D., has been duly served with summons in this case, and that he is in default for answer and demurrer, and that the allegations of the petition [and cross-petition] are thereby confessed by him to be true.

¹ See *Maholm v. Marshall*, 29 Ohio St. 615, and other cases there cited.

DECREES FOR SALE—

216. (Sec. 5316.) *Amount found due to plaintiff [with personal judgment]¹ and decree for sale, where there is no cross-petition.*

[*Title.*]

Begin with Preface I. or II., above, and continue:—and that there is due the plaintiff from the defendant, C. D., on the promissory note [*or, notes*] set forth in the petition, with interest to the first day of this term [*or, date of this decree*], the sum of — dollars.

The court further find that in order to secure the payment of said note [*or, notes*], the defendants, C. D. and M. D., his wife, executed and delivered to said A. B., the plaintiff, their certain mortgage as in the petition described, and on the premises therein described; that said mortgage was duly recorded in book —, page —, of the records of mortgages of — county, and is a good and valid lien on the premises described in the petition, and that the conditions in said mortgage have been broken.

It is therefore [considered by the court that the plaintiff recover¹ from the defendant the said sum of — dollars and his costs herein expended. And it is further] adjudged and decreed that unless the defendant, C. D., shall within — days² from the entry of this decree, pay, or cause to be paid, to the clerk of this court the costs of this case, and to the plaintiff herein the sum so found due as aforesaid, with interest from the — day of —, 18—, *the defendants' equity of redemption be foreclosed, and said premises³ be sold, and that an order of sale issue therefor to the sheriff of —

¹ By virtue of section 5021. If personal judgment is not desired, omit the part in brackets.

² It is not proper practice for the judgment upon the mortgage debt to direct a sale absolutely, without any time being given to the mortgagor to make payment. A time for payment should be stated, and a sale ordered in the event of failure. *King v. Longworth*, 7 Ohio, 231.

³ It is not necessary to put in the decree the description of the property, though it is often done as a precautionary measure, considering that papers are liable to be lost or mislaid.

⁴ The sale may also issue to the sheriff "as special master commissioner;" and

county¹ [*or*, R. W., a master commissioner of this court; *or*, to F. G., who is hereby appointed a special master commissioner for that purpose], directing him to appraise, advertise, and sell said premises as upon execution,¹ and report his proceedings to this court for further order.

Court may add by section 5404:]

And it being for the best interests of all parties, it is ordered that the sale be upon the premises, instead of at the court-house.

If parties desire that terms of sale should be other than cash, before land has been twice advertised and offered for sale (as provided for in section 5417), the order may be made by consent of parties, thus:

Order that time be allowed in payments.

And, by consent of parties, it is ordered that said land be sold on terms of one-third cash: one-third in — months, and one-third in — months from the day of sale, the deferred payments to draw — per cent interest and be secured by mortgage on the premises.

Court may also add by section 5394:]

Order dispensing with German advertisement.

And, on motion of the plaintiff, and for good cause shown, advertisement of sale in a German newspaper is hereby dispensed with.²

If the order is to a special master, add to the above decree, if a bond is required of him:]

Order that special master give bond.

And it is ordered that before entering upon his duties, said F. G. shall enter into an undertaking to the approval of the court, and conditioned according to law, in the sum of \$——.

And thereupon came the said F. G., and, as such special master, presented his bond, with S. T. and C. E. as sureties, to the approval of the court.

he is not required to take an additional oath, or give an additional bond. See *Norton v. Gray*, Cuyahoga Common Pleas, 1857, 1 W. L. M. 404.

¹ Sec. 5400.

² By the same section, an order may be added that advertisement of the sale be made in a newspaper printed in the Bohemian language.

217. (Sec. 5316.) *Amount found due to plaintiff and cross-petitioner [with personal judgment],¹ and decree for sale;—when all the notes are secured by one mortgage.*

[Title.]

Use Preface I. or II., p. 107, and continue:]—and that there is due to the plaintiff from the defendant, C. D., on the promissory note [*or, notes*] set forth in the petition, with interest to the first day of this term, the sum of — dollars.

The court further find that, in order to secure the payment of said note, with others, the defendants, C. D., and M. D., his wife, executed and delivered to said A. B. their certain mortgage, as in the petition described, and on the premises therein described; that said mortgage was duly recorded in book —, page —, of the records of mortgages of — county, Ohio, and is a good and valid lien [*or, the first and best lien*] on the premises described in the petition; and that the conditions of said mortgage have been broken.

And the court further find that there is due to the defendant, E. F., from the defendant, C. D., on the note set up in his cross-petition, including interest to the first day of this term, the sum of — dollars, and that the mortgage hereinabove set forth was given to secure the payment of this note as well as the one held by the plaintiff herein.

It is therefore [considered by the court that the plaintiff recover¹ from the defendant, C. D., the said sum of — dollars, and that the defendant E. F. recover from his co-defendant the said sum of — dollars, as heretofore respectively found due them; and it is further] adjudged and decreed that, unless said defendant, C. D., shall, within — days from the entry of this decree, pay, or cause to be paid, to the clerk of this court the costs in this case, and to the plaintiff, and to the defendant, E. F., the sums so found due them as aforesaid, with interest from the — day of — *, the defendant's equity of redemption be foreclosed, and said premises be sold, and that an order of sale issue therefor to the sheriff of — county [*or, to R. W., a master commissioner*

¹ By sec. 5021. Omit part in brackets if no personal judgment is desired.

of this court], directing him to appraise, advertise, and sell said premises as upon execution, and report his proceedings to this court for further order.¹

218. (Sec. 5316.) *Amounts found due to plaintiff and cross-petitioner [with personal judgment],² and decree for sale—when notes are secured by several mortgages.*

[Title.]

Use Preface I. or II., p. 107, and continue:]—and that there is due to the plaintiff from the defendant, C. D., on the promissory note [*or, notes*] set forth in the petition, with interest to the first day of this term, the sum of — dollars.

The court further find that, in order to secure the payment of said note, the defendant, C. D., and M. D., his wife, executed and delivered to said A. B. their certain mortgage, as in the petition described, and on the premises therein described; that said mortgage was duly recorded in book —, page —, of the records of mortgages of — county, Ohio, and is a good and valid [*or, the first and best*] lien on the premises described in the petition, and that the conditions of said mortgage have been broken.

And the court further find that there is due to the defendant, E. F., from the defendant, C. D., on the note set up in the cross-petition of the said E. F., including interest to the first day of this term, the sum of — dollars; and that, to secure the payment of said note, the defendant, C. D., and M. D., his wife, executed and delivered to said E. F. their certain mortgage, as in the cross-petition described, and on the premises therein described, being the same premises [*or, a part of the same premises; or, being the same premises together with other property*] as described in the petition; that said mortgage was duly recorded in book —, page —, of the records of mortgages of — county, and is a good and valid lien, after the lien of the plaintiff, on said prem-

¹ For other orders that may be added, see after the last decree. See, also, notes to last decree.

² By sec. 5021. If personal judgment is not desired, omit the part of this decree in brackets.

ises for the amount so found due to the said E. F.;¹ and that the conditions of said mortgage have been broken.

It is therefore [considered by the court that the plaintiff recover² from the defendant, C. D., the said sum of — dollars, and that the defendant, E. F., recover from his co-defendant the said sum of — dollars, as heretofore respectively found due them; and it is further] adjudged and decreed that, unless said defendant, C. D., shall, within — days from the entry of this decree, pay, or cause to be paid to the clerk of this court the costs in this case, and to the plaintiff, and to the defendant, E. F., the sums so found due them as aforesaid, with interest from the — day of — *, the defendant's equity of redemption be foreclosed, and said premises be sold, and that an order of sale issue therefor to the sheriff of — county [*or, to R. W., a master commissioner of this court*], directing him to appraise, advertise, and sell said premises as upon execution, and report his proceedings to this court for further order.³

219. (Sec. 5316.) *Decree finding part of several notes due [personal judgment],² and decree for sale.⁴*

[*Title.*]

Use Preface I. or II., on p. 107, and continue:]—and that the defendant executed to the plaintiff the four several notes, as set forth in the petition; that one of said notes was past due when the petition was filed; that one has become due since that time, and that both of said notes are unpaid;⁴ and that

¹ A decree for sale, and a sale made upon finding the amount due the plaintiff, without determining any other liens, are good. *D., X. & B. R. R. Co. v. Lewton*, 20 Ohio St. 411.

The finding of other liens may be deferred, and made in the decree of confirmation. See *Dempsey v. Bush*, 18 Ohio St. 383.

² By sec. 5021. Omit the part in brackets if personal judgment is not desired.

³ Other orders may be added if desired, as after Entry No. 216. See, also, notes to decree No. 216.

⁴ Where a bill of foreclosure sets forth some notes as past due, and others as running to maturity, a decree may be taken for all the notes due at the time of the decree, without a supplemental bill. *Hamilton Supreme Court, 1844, Drake v. Bracket*, 1 W. L. J. 395; *King v. Longworth*, 7 Ohio, 585.

But no judgment can be taken for the note not yet due. *King v. Longworth, supra.*

the others are not yet due. The court further find that there is due to the plaintiff from the defendant, on said notes which are overdue, with interest to the first day of this term, the sum of — dollars.

The court further find that, in order to secure to plaintiff the payment of said several notes, the defendants, C. D., and M. D., his wife, executed and delivered to said A. B. their certain mortgage, as in the petition described, and on the premises therein described; that said mortgage was duly recorded in book —, page —, of the records of mortgages of — county, and is a good and valid lien on the premises described in the petition; and that the conditions of said mortgage have been broken.

It is therefore [considered by the court that the plaintiff recover¹ from the defendant, C. D., the said sum of — dollars, and his costs herein expended. And it is further] adjudged and decreed that, unless the defendant, C. D., shall, within — days from the entry of this decree, pay or cause to be paid to the clerk of this court the costs of this case, and to the plaintiff herein the sum so found due as aforesaid, with interest from the — day of —, 18—, * the defendant's equity of redemption be foreclosed, and said premises be sold, and that an order of sale issue therefor to the sheriff of — county [or, to R. W., a master commissioner of this court], directing him to appraise, advertise, and sell said premises as upon execution, and report his proceedings to this court for further order.²

20. (Sec. 5316.) *Decree foreclosing mortgage given to indemnify, etc., and ordering sale.*

[Title.]

Use Preface I. or II., page 107, and continue:—and that said plaintiff's did, on the 1st day of February, 1871, at the request of said defendant, D. G., indorse the one hundred and ten promissory notes mentioned and described in said petition; and that D. G., for the purpose of securing and indemnifying

¹ If personal judgment is not wanted, omit the part in brackets.

² Add other orders, if desired, as after Entry No. 216. See also notes after decree No. 216.

said plaintiffs against loss and damage on account of their said indorsement, did, on the day aforesaid, make, execute, and deliver to plaintiffs the mortgage described in said petition, which was duly recorded in book —, page —, of the records of mortgages of — county, and then and thereby became, and still is, a valid lien on the real estate in the petition described.

And the court further find that said D. G. did not pay, or cause to be paid, said twenty-notes maturing at nine months after their date, but permitted all of said notes to mature and be protested, and the liability of said plaintiffs, as indorsers, to become fixed and absolute, and that said plaintiffs were compelled to, and did, pay seven of said notes, as stated in said petition, amounting in the aggregate to \$6,146.11, exclusive of interest; and that they also paid, on said seven notes, the interest which had accrued thereon from their date, December 22, 1870; and the court finds that said plaintiffs are liable and bound to pay all the remaining fourteen of said notes, maturing at nine months after date, as stated in said petition, with interest from date.

And the court finds that said plaintiffs are entitled to have said mortgage foreclosed, and the said mortgaged property in the petition described sold, for the purpose of indemnifying them for the money so paid out by them, as well as to indemnify them for what they may hereafter be compelled to pay on the other notes mentioned in said petition, which have matured, and on which their liability has become fixed, as aforesaid.

Wherefore, it is ordered and decreed that, unless said D. G. shall, within — days from this date, pay, or cause to be paid, to the clerk of this court the costs of this action, and to said plaintiffs the amount so as aforesaid paid out by them, in taking up and paying said seven notes, and shall relieve and free them from all liability on said remaining fourteen notes above mentioned,* the defendant's equity of redemption be foreclosed, and said premises be sold, and that an order of sale issue therefor to the sheriff of — county [*or*, to R. W., a master commissioner of said court], directing him to

appraise, advertise, and sell said premises, as upon execution, and report his proceedings to this court for further order.¹

221. *Decree finding a deed and lease back to be a mortgage, and for foreclosure of same*
[Title.]

Use Preface I. or II., page 107, and continue:—The court further find that, on the — day of —, 18—, a deed was made by the plaintiff to the defendant, conveying the premises described in the petition, which deed is recorded in book —, page —, of the records of deeds of — county, Ohio, and that, on the same day, a lease was made by the defendant to the plaintiff of the same premises, which lease is recorded in book —, page —, of the records of leases of — county, Ohio, and that, at the time said instruments were executed, it was the understanding and intention of said parties that the deed and lease back should together constitute and be a mortgage on the said premises: and they are now so found and declared to be by the court.

The court further find that there is due to the plaintiff from the defendant upon the said deed and lease, with interest to the first day of this term, the sum of — dollars, which is a good and valid lien on the said premises.

It is therefore adjudged and decreed that, unless the said C. D. shall, within — days from the entry of this decree, pay, or cause to be paid, to the clerk of this court the costs of this case, and to the plaintiff herein the said sum of \$ —, with interest from the — day of —, 18—, said premises shall be sold as upon execution at law, and that an order of sale issue therefor to the sheriff [*or*, to R. W., a master commissioner of said court, as in case of foreclosure of a mortgage, directing him to appraise, advertise, and sell said premises as upon execution, and report his proceedings to this court for further order.²

¹Add other orders, as after decree No. 216, if desired. See also notes to sec. 216.

²See notes to decree No. 216. Other orders may also be added, as after No. 216.

222. (Sec. 5316.) *Order to subdivide real estate.*

[*Title.*]

On motion to this court by the —, and good cause shown, it is ordered that the sheriff, before making an appraisement of the premises heretofore ordered in this action to be sold, cause the same to be subdivided into lots of such size and form as in his opinion will sell to the best advantage; and that he appraise, advertise, and sell the said premises by lots according to said subdivision.

And it is further ordered that said sheriff, if need be, may call to his aid a competent surveyor for the running and establishing of the lines of said subdivision; and for determining the proper measurement and area of said lots.

223. (Sec. 5317.) *When property is situated in more than one county—order that sheriffs of respective counties sell.*

[*Title.*]

As in any of the above entries to * and conclude:]—the defendant's equity of redemption be foreclosed and said premises be sold. And it appearing that said premises are situated partly in this county and partly in the county of —, it is ordered that the sheriff of each county sell so much of said real estate as lies in his own county, and that orders of sale issue therefor to said sheriffs, in accordance with the above order, directing them to appraise, advertise and sell said premises, as upon execution, and return their proceedings, with proceeds of sale, to this court for further order. And it is ordered that each sheriff select appraisers from his own county, and make publication of the sale in his own county only [*or, in both counties.*]

224. (Sec. 5317.) *Same—one officer directed to sell the whole.*

[*Title.*]

As in any of the above decrees to * and continue:]—the defendant's equity of redemption be foreclosed and said premises be sold. And it appearing that said premises are situated partly in this county and partly in the county of —, it is ordered that the sheriff of this county sell all of said property, and that an order of sale issue therefor to him, directing him to

appraise, advertise and sell all of said premises, as upon execution, and bring the proceeds into court for further order.

And it is ordered that said sheriff may select appraisers from either county, and that one set appraise the whole [*or*, that said sheriff select appraisers from each county to appraise the lands in their own county] and that he make publication of the sale in both counties [*or*, in — county only.]

CONFIRMATION AND DISTRIBUTION—

The court can confirm, or set aside, a judicial sale, but can not modify its terms.¹

225. *Decree of confirmation, order for deed, and distribution of proceeds.*

[*Title.*]

On motion of the plaintiff, and on his producing the return of the sheriff [*or*, the report of the master commissioner herein] of the sale made under the former order of this court; and the court, on careful examination of the proceedings of the said sheriff [*or*, master commissioner] being satisfied that the same have been had in all respects in conformity to law and the orders of this court, it is ordered that the said proceedings and sale be, and they are hereby, approved and confirmed. And it is further ordered that the said sheriff [*or*, the said sheriff as special master commissioner,² *or*, said master commissioner³] convey to the purchaser, R. W., by deed, according to law, the property so sold;⁴ and the said purchaser is hereby subrogated to all the rights of the said lienholders, in said premises, so far as they may be paid herein, for the protection of his title;⁵ and a writ of possession is awarded to put said purchaser in possession of said premises.⁶

It is further ordered that the clerk cause satisfaction of the mortgage [*or*, mortgages] herein sued on to be entered on the

¹ Ohio Life Ins. and Trust Co. v. Goodin, 10 Ohio St. 557.

² See note 4, page 108, *ante*.

³ Sec. 5400.

⁴ Sec. 5401; also, see note 1, page 155.

⁵ See sec. 5410.

⁶ This writ is only awarded against parties to, or bound by, the action; and as the statute provides a method of obtaining possession of property unlawfully withheld, it is doubted by some whether this remedy can be resorted to.

record [*or, records*] thereof, in the office of the recorder of — county.¹

And the court coming now to distribute the proceeds of said sale, amounting to — dollars, it is ordered that the sheriff [*or, master commissioner*] out of the money in his hands, pay—

First: To the treasurer of this county the taxes penalty and interest against said property, to wit, the sum of — dollars.²

Secondly: The costs of this action, taxed at —.*

Thirdly: To the plaintiff, A. B., the amount heretofore found due him, with interest, to wit, the sum of — dollars.

Fourthly: To the defendant, E. F., the amount heretofore found due him, with interest, to wit, the sum of — dollars.

Fifthly: To the defendant, C. D., the balance of the money remaining in his hands, to wit, the sum of — dollars.

If the proceeds of sale are not sufficient to pay all the claims, and the original petition, or an amended petition or cross-petition, has asked for a personal judgment, and it has not already been given, the court may, after distribution of proceeds, give a personal judgment and award an execution for the balance remaining due to the plaintiff or a cross-petitioner. Or, whether personal judgment has been asked for or not, execution may be awarded for the balance remaining due.³

226. *Personal judgment for balance remaining due.*

[*Title.*]

*As in last to *, and continue:]*

Thirdly. To the plaintiff, A. B., the balance of the said money remaining in his hands, to wit, the sum of — dollars, to be applied as a credit upon his judgment against the said defendant.

And there still remaining due to the said A. B. the sum of — dollars, it is considered that he recover the same from the defendant, C. D.; and execution is awarded therefor.

¹ See sec. 4138.

² By sec. 2854. As to what taxes are included, see note under Entry No. 288, page 155.

³ See page 107.

227. *Execution awarded for balance remaining due.*

[Title.]

*As in No 225 to *, and continue:]*

Thirdly. To the plaintiff, A. B., the balance of the said money remaining in his hands, to wit, the sum of — dollars, to be applied as a credit upon his judgment against the said defendant.

And there still remaining due to the said A. B. the sum of — dollars, execution is awarded against the said C. D. therefor.

228. *Confirmation and distribution, in case of part of several notes being due.*

[Title.]

*As in No 225 to *, and continue:]*

Thirdly. The court find that, since the judgment herein, the third one of the notes set forth in the petition has become due, and is unpaid, and that there is due the plaintiff thereon, with interest to the present day, the sum of — dollars. The court further find that the fourth one of said notes in the petition described is not yet due, and that there is owing thereon to said plaintiff the sum of — dollars, which, the court find, the plaintiff is entitled to receive out of the proceeds of said sale, by virtue of its lien on the property sold. It is therefore ordered that the sheriff pay to the plaintiff, A. B., the amount herein and in the former decree found due and owing him, with interest, to wit, the sum of — dollars.

Fourthly. To the defendant, C. D., the balance of the money remaining in his hands, to wit, the sum of — dollars.

BUILDING ASSOCIATION DECREES (Sec. 3833-6)—

After breach of the condition of a mortgage given to secure the payment of stated dues, interest on loans advanced, and fines, the decree in an action to foreclose should be confined to the amount of such dues, interest, and fines then due and unpaid,¹ and under the law as it now stands, section 3835, as amended in 86 v. 87, would be included also the proportional part of the premium due.

¹ *Hagerman v. Ohio Building and Saving Association*, 25 Ohio St. 186.

Building associations are not authorized to charge interest on the premiums allowed for precedence in taking loans. The money actually advanced is the basis for the computation of interest.¹

Fines can not be imposed for default in the payment of interest on loans; nor can more than one fine be assessed in respect to the same installment of stated dues.¹

Upon distribution, the rule laid down by the District Court of Hamilton county, before the amendment of 77 O. L. 208, was to find the present value of the mortgage as the basis of distribution. And the present value was held to be such a sum as when put at interest would meet each installment up to the time the association was dissolved. It was ascertained by summing up the successive weekly installments for the probable future duration of the association and discounting the amount for the mean or average time between the first installment and the last; that is, the probable future duration from and after confirmation being one hundred and twenty-two weeks, the mean or average time is sixty-one and a half weeks, and \$915 being the estimate of future dues and interest, the present value is \$854.36, a sum which at interest for sixty-one and a half weeks would produce \$915.

Then the calculation stands thus:

Amount found due by decree of sale, being amount of	
dues, interest, and fines up to decree.....	\$229 50
Interest to confirmation..	4 65
Dues and interest from decree of sale to confirmation.....	135 00
Interest on above, average time	1 48
Present value of future dues and interest from decree of	
confirmation.....	854 36
	<hr/>
	\$1,224 99

The above rule differed from the one previously laid down by the Superior Court of Cincinnati.²

But since the amendment of 77 O. L. 208, a more satisfactory rule will probably prevail. By that section it is provided that "after the premium for one year shall have been paid, the borrowing member shall be permitted to adjust and pay off his loan by paying to the association an amount which, added to the dues and interest already paid and earnings credited, will aggregate the sum actually bor-

¹ Forest City United Loan and Building Association v. Farrell et al., 25 Ohio St. 208.

² Cincinnati German Building Association No. 3 v. Flach, 1 Superior Court Reporter, 468.

rewed, with the legal rate of interest thereon, and a relative proportion of the premium bid for the time the loan is retained, as hereinbefore provided." This should also be the rule for determining the amount due on distribution in case of foreclosure.

229. *Decree for sale on foreclosure of building association mortgage.*

[*Title.*]

Use Preface I or II, page 107, and continue:]—The court further find that the defendant has failed to pay to the plaintiff the weekly installments of dues, premium, and interest, as in the petition set forth, and that there is due to said plaintiff, as dues, to the date of this decree, the sum of \$—, as premium the sum of \$—, as interest the sum of \$—, and as fines for the non-payment of said dues, the sum of \$—; making in all, the sum of — dollars.

The court further find, that in order to secure the regular payment of said dues and other installments, as well as those hereafter to become due, the said C. D., and M. D., his wife, executed and delivered to this plaintiff their certain mortgage in the petition described, and on the premises therein described; that said mortgage was on the — day of —, 18—, duly recorded in book —, page —, of the records of mortgages of — county, and that the same is a good and valid [*or, the first*] lien on the premises described in the petition.

It is therefore considered by the court that unless the said defendants shall, within — days from the entry hereof, pay, or cause to be paid, to the said plaintiff the said sum of \$—, so found due, and to the clerk of this court the costs, taxed herein at \$—, the defendant's equity of redemption be foreclosed and said premises be sold, and that an order of sale issue therefor to the sheriff of — county [*or, to R. W., a master commissioner of this court*], directing him to appraise, advertise, and sell said premises, as upon execution, and return his proceedings to this court for further order.¹

¹ Other orders may be added as after decree No. 216, if desired. See also notes to decree No. 216.

230. *Confirmation and distribution on building association decree, as before the amendment of 77 O. L. 208.*

[*Title.*]

*As in No. 225 to *, and continue:]*

And the court find that the present value of the mortgage held by said plaintiff amounts to the sum of \$1,239.22, and that said sum is the next best lien upon the said premises; it is therefore ordered that said sheriff pay—

Thirdly. To said plaintiff, or to J. R. V., its attorney, the said sum of \$1,239.22.

Fourthly. That he pay the balance remaining in his hands to the said defendant or his attorney.

230a. *Confirmation and distribution on building association decree, under the amendment of Sec. 3834, 77 O. L. 208.*

[*Title.*]

*As in No. 225 to *, and continue:]*

And the court find that there is due to the plaintiff up to the present time on the mortgage set up in the petition the sum of \$——, and that said sum is the next best lien upon the said premises; it is therefore ordered that said sheriff pay—

Thirdly. To said plaintiff, or to J. R. V., its attorney, the said sum of \$——.

Fourthly. That he pay the balance remaining in his hands to the said defendant or his attorney.

For judgment against a married woman, see MARRIED WOMEN, p. 428.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

FINDING IV.—For judgment taken on defendant's default.

FORMS OF JUDGMENT BY DEFAULT.

1. *When the court finds the amount due—*

231. (Sec. 5320.) Judgment by default for money due.

232. (Sec. 5320.) In action for damages, damages assessed by the court, etc.

233. (Sec. 5320.) Judgment, etc., on cause of action not put in issue.

234. (Sec. 5320.) Judgment when part payment has been made.

II. *When the case is referred to referee or master.*

235. (Sec. 5320.) To take an account before finding defendant's default.

236. (Sec. 5320.) To take proof of a fact before finding defendant's default.

237. Judgment after the report stating account.

238. Judgment after the report finding fact.

239. (Sec. 5320.) Default and indebtedness found, and case sent to a referee or master to take an account.

240. Judgment on the report.

III. *When the case is sent to a jury.*

241. (Sec. 5320.) Default and indebtedness found, and case sent to a jury to assess damages.

242. Verdict on assessment of damages.

243. Judgment on the verdict assessing damages.

REMITTITUR—

244. Entry of.

245. Order for.

By failure to answer, the defendant conclusively confesses the allegations and claims of the plaintiff against him.¹

Where summons is indorsed "for the recovery of money," and the petition claims a further and different relief, the court will not enter up a judgment by default for answer against a defendant for other relief than that indorsed on the summons;² nor for a larger amount, though the surplus be for interest, no interest being asked for in the prayer of the petition.³

Where no answer has been put in, a decree can not be rendered against infants by default, but the plaintiff must prove his case.⁴

Where a party, by his own mistake, and without any fault of the adversary party, takes judgment by default for a less sum than the amount due on his claim, he can not maintain a second action to recover the remainder.⁵

When the defendant is in default, the court may, in a proper case, render judgment without taking any further proof than is furnished

¹ McKenzie v. Perrill et al., 15 Ohio St. 167.

² Williams v. Hamlin, 1 Handy S. C. R. 95.

³ Rhodenbaugh v. Cary, 1 W. L. M. 599; Finckh v. Evers, 25 Ohio St. 82.

⁴ Massie v. Donaldson, 8 Ohio, 377.

⁵ Ewing v. McNairy, 20 Ohio St. 315.

by the affidavit of the petition, and the failure of the defendant to plead.¹

When the petition is founded on a promissory note, the original note should be filed with the court when judgment is taken, both as evidence and to prevent its further circulation.

As a general finding to be used in case of judgment by default, use the following :

FINDING IV.—*For judgment taken on defendant's default.*

[*Title.*]

Now comes the plaintiff, by his attorney, and the defendant being in default for answer and demurrer, the court find* that the allegations of the petition are confessed by him to be true.

FORMS OF JUDGMENT BY DEFAULT.

I. *Where the court finds the amount due.*

For forms of judgments in general, which, of course, may be rendered on defendant's default as well as on submission, see the preceding chapter.

231. (Sec. 5320.) *Judgment by default for money due.*

[*Title.*]

Use Finding IV., above, and continue :]—and that he is indebted to the plaintiff in the sum of \$——.

It is therefore considered by the court that the said plaintiff, A. B., recover from the defendant C. D., the said sum of —— dollars, and his costs herein expended.

232. (Sec. 5320.) *In action for damages, damages assessed by the court, and judgment.*

[*Title.*]

Finding IV., above, and continue :]—and that the plaintiff is entitled to recover his damages by reason of the premises from the said defendant. And thereupon the court assess said damages at \$——.

It is therefore considered that the plaintiff, A. B., recover from the defendant, C. D., the said sum of \$——, and his costs herein expended.

¹ Dallas v. Ferneau, 25 Ohio St. 635.

233. (Sec. 5320.) *Judgment by default on cause of action not put in issue, etc.*

[*Title.*]

And now came the plaintiff, by his attorney, and submitted to the court the petition and evidence and the answer of the defendant in this case. And thereupon the court find that the first and second causes of action in said petition set forth are not put in issue by said answer, but that as to them the defendant is in default for plea, and that he is indebted to plaintiff upon the same in the sum of \$——.

It is therefore considered that the plaintiff, A. B., recover from the defendant, C. D., the said sum of —— dollars so found due, together with his costs in that behalf expended. And as to the causes at issue, this action is continued.

234. *Judgment by default when part payment has been made.*

[*Title.*]

Finding IV., as above, and continue:—The court further find that, since the filing of the petition herein, the defendant has paid to plaintiff on his claim the sum of \$——, and that he is still indebted to him in the sum of —— dollars.

It is therefore considered by the court that the plaintiff A. B., recover from the defendant, C. D., the said sum of \$——, and his costs herein expended.

II. *When the case is referred to referee or master.*

Sec. 5320 provides, on defendant's default, that if in the determination of the cause the taking an account, proof of a fact, or the assessment of damages, is necessary, the court may refer the case to a referee or master for such purpose, or direct the matter to be ascertained by a jury. The referee in this case would appear to have about the same duties to perform and scope of authority as in case of reference before the code, for which see remarks p. 73. When the case is sent to a referee or master under this section, it is not usual for the court to find the default and the defendant's indebtedness so as to preclude him from making a defense, until after the report comes in, though it is probable that it has the power to do so. Forms for both methods of practice are given.

235. (Sec. 5320.) *Case sent to a referee or master to take an account—before finding defendant's default.*

[Title.]

It being necessary that an account should be taken in this case between the parties before the amount due to the plaintiff can be ascertained, it is now ordered that the case be referred for the taking of such account to E. F., as referee [*or*, a master commissioner of this court]; and that he report [the testimony with his findings]¹ to this court without unnecessary delay.

236. (Sec. 5320.) *Case sent to referee or master to take proof of a fact, before finding defendant's default.*

[Title.]

It being necessary in this case that proof should be taken as to whether [*etc., state fact to be ascertained*], and it being inconvenient to have the evidence taken before the court, it is hereby ordered that, for the taking of said proof, the case be referred to E. F. [one of the master commissioners of this court], who is hereby directed to report [the testimony with his findings]¹ to this court without unnecessary delay.

237. *Judgment after the report stating account.*

[Title.]

Now came the plaintiff, by his attorney, and the defendant being in default for answer and demurrer, this cause came on to be heard on the motion of the plaintiff to confirm the report of the referee [*or*, master], heretofore filed herein, and for judgment. And the court having carefully examined the said report, hereby approve and confirm the same.

And the said referee [*or*, master] having found and reported, on taking the said account, that there is a balance due thereon to the plaintiff from the defendant of — dollars, it is therefore considered by the court that the plaintiff recover from the defendant the said sum of — dollars, and his costs herein expended, including a fee of \$—, hereby allowed to the said referee [*or*, master], taxed at \$—.

¹ Optional with the court.

238. *Judgment after report finding fact.*

[Title.]

Now came the plaintiff, by his attorney, and the defendant being in default for answer and demurrer, this cause came on to be heard on the motion of the plaintiff to confirm the report of the referee [*or, master*], heretofore filed herein, and for judgment.

And the court, after careful consideration, approves and confirms said finding as the finding of the court; and thereupon further finds that the defendant is indebted to plaintiff in the sum of — dollars.

It is therefore considered that the plaintiff recover from the defendant the said sum of — dollars, together with his costs herein expended, including a fee of \$—, hereby allowed to the referee [*or, master*], taxed at \$—.

239. (Sec. 5320.) *Default and indebtedness found, and case sent to a referee or master to take an account.*

[Title.]

Now came the plaintiff, by his attorney, and the defendant being in default for answer and demurrer, the court find that the allegations of the petition are confessed by him to be true, and that the plaintiff is entitled to recover from the defendant the amount due him upon the statements of the petition. But it being necessary that an account should be taken between the said parties, it is, on motion of the plaintiff, ordered that the case be referred to E. F., as referee [*or, one of the master commissioners of this court*], to take and state the same; and that he report [the testimony with his findings]¹ to this court without unnecessary delay.

240. *Judgment on the report.*

[Title.]

This cause having been referred to E. F., to take and state an account between the parties hereto, and the report of the said E. F. having been filed, whereby he finds on said account that the defendant is indebted to the plaintiff in the sum of

¹Optional with the court.

§——, on motion of the plaintiff, and on consideration of the said report, it is hereby approved and confirmed.

It is therefore considered by the court that the plaintiff recover from said defendant said sum of —— dollars, together with his costs, including a fee of §—— to the said referee [*or, master*], taxed at §——.

III. *When the case is sent to a jury.*

Under section 5320 there is, of course, no *issue* to be tried, and consequently nothing to come before a jury in its usual capacity as given by section 5130; but, by section 5320, the court may make special use of the jury, constituting them, as it were, special masters. It is not likely that the court would ever desire to refer a case to a jury to take an account, and seldom to hear proof of a fact; but in most cases will to assess damages; and probably has the power so to refer either before or after finding defendant's default and indebtedness. In either case, the question before the jury is not whether the plaintiff has sustained any damages or not, but "What damages has the plaintiff sustained?"

241. (Sec. 5320.) *Default and indebtedness found, and case sent to a jury to assess damages.*

[*Title.*]

Now came the plaintiff, by his attorney, and the defendant being in default for answer and demurrer, the court find that the allegations of the petition are confessed by him to be true, and that the plaintiff is entitled by reason of the premises to recover his damages from said defendant. And it is ordered that the case be sent to a jury to ascertain and assess the same.

242. *Verdict on assessment of damages, under last order.*

[*Title.*]

And now this cause came on to be heard upon inquiry of damages for the plaintiff, as heretofore ordered by the court; and thereupon came the following-named persons as jurors, to wit:

1. A. B.

7. E. F.

2. C. D.

8. G. H.

etc.

etc

who were duly impaneled and sworn according to law.

And after hearing the evidence in the case, the argument,

and the charge of the court, the jury retired to their room, in charge of the sheriff, for deliberation.

And now come said jury into open court, with their verdict in writing, signed by their foreman, and say:

“We, the jury, upon inquiry of damages for the plaintiff in this action do assess the same against the defendant at — dollars.”

243. *Judgment on the verdict assessing damages.*

[*Title.*]

The jury in this action having, at a former day of this court, upon an inquiry of damages for the plaintiff, assessed the same against the defendant at — dollars:

It is therefore considered by the court that the plaintiff, A. B., recover from the defendant, C. D., the said sum of — dollars, so found due, together with his costs herein expended.

REMITTITUR—

Where a judgment by default is taken for more than the amount claimed in the petition, and indorsed on the summons, although such surplus is for the interest that accrues since the filing of the petition (no prayer for interest being in it), it is error, and the judgment will be reversed, unless the creditor will remit such overplus; that being remitted, the judgment will stand. But in such a case, it being substantially a reversal, the costs of error will be divided.¹ Where judgment is taken for more than is at the time legally due, the error may be corrected by remitting the excess.²

244. *Entry of remittitur.*

[*Title.*]

And now, it appearing to the court that the judgment heretofore rendered herein is erroneous, in being for a larger amount than was claimed in the petition and indorsed on the summons, the court, on consideration of the premises, find that said judgment should have been for the sum of — dollars, with interest from the — day of —, 18—.

And the plaintiff now coming and remitting from his said judgment the sum of \$—, it is therefore considered that

¹ Rhodenbaugh v. Cary, 1 W. L. M. 599.

² Doty v. Rigour, 9 Ohio St. 519.

the said plaintiff recover from the said defendant the said sum of — dollars, as above found due, instead of the said amount originally found; together with his costs herein expended [*or, any other order as to costs.*]

245. *Order for remittitur, etc.*

[*Title.*]

This cause coming on for hearing on the motion of the defendant to set aside the judgment herein, because the same is for more than was legally due upon the petition and summons, and the court finding the claim of the defendant to be true, and that said judgment should have been for the sum of \$—, instead of \$—, it is ordered that, unless the plaintiff will remit from his judgment the sum of \$—, the said judgment shall be set aside.

And thereupon comes the said plaintiff, and consents to said remittitur, and the same being made, the motion to set aside the judgment is overruled.

CHAPTER III.

JUDGMENT BY CONFESSION.

WHEN DEFENDANT APPEARS PERSONALLY—

246. (Sec. 5321) Judgment where petition has been filed.

247. (Sec. 5322.) Judgment where no petition has been filed.

WHEN DEFENDANT APPEARS BY AN ATTORNEY—

248. (Sec. 5324) Judgment.

By the code, a confession of judgment may be made by any person indebted, or against whom a cause of action exists.

1. By personal appearance in a court of competent jurisdiction.¹

2. By authorizing an attorney to confess judgment for him.²

WARRANT OF ATTORNEY.—The warrant of attorney is an instrument in writing addressed to one or more attorneys therein named, authorizing them generally to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt.

¹ Code, sec. 5321.

² Code, sec. 5324.

A warrant of attorney given to confess a judgment is not revocable; and, notwithstanding a revocation, judgment may be entered upon it.¹ The death of the debtor is, however, generally speaking, a revocation.²

The virtue of a warrant of attorney is spent by the entry of one judgment, and a second judgment entered on the same warrant is irregular.³

The warrant must be produced at the time of taking judgment,⁴ and if not produced, the judgment may, on motion be set aside as irregular.⁵

If the power of attorney is attached to the note, forming a part of the same instrument, the negotiability of the note is not destroyed, but if it is transferred, the power of attorney becomes invalid, and no power is given under it to the indorsee; he holds the note as if no such power had ever been attached to it.⁶ But if the power authorizes the confession of a judgment in favor of any holder of the note at any time after the same becomes due—*quare?*⁷

It is the custom of most courts in Ohio to require notice to be given to the defendant of the time and place of taking judgment.

In *Pomeroy v. Drake*, 1 W. L. M. 282, it is said that a judgment entered on a warrant of attorney will be set aside, and the cause set down for trial, on motion of the defendant, when it appears that the motion is made in good faith, and that, *prima facie*, a defense exists, if the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.⁸

In case of judgment being taken by authority of a warrant of attorney, the court generally requires the attorney who confesses for the defendant to sign the journal, as in the forms hereafter given.

Interest on the debt must be calculated to the day judgment is entered, and judgment given for the whole amount.

The confession of itself operates as a release of errors without being ordered in the judgment.⁹

¹ 2 Lord Raymond, 766, 850; 1 Salk. 87; 7 Mod. 93.

² Co. Litt. 52*b*; 1 Vent. 310.

³ 1 Penn. 245; 6 S. & R. 296.

⁴ Code, sec. 5324.

⁵ *Knox County Bank v. Doty*, 9 Ohio St. 505.

⁶ *Osborn v. Hawley*, 19 Ohio, 130.

⁷ *Marsden v. Soper*, 11 Ohio St. 503; see also *Cushman v. Welsh*, 19 Ohio St. 536.

⁸ See also 4 W. L. M. 110, 124.

⁹ Code, sec. 5323.

WHEN DEFENDANT APPEARS PERSONALLY—

246. (Sec. 5321.) *Judgment where petition has been filed.*

[Title.]

Now came the plaintiff, by his attorney, and also personally came the defendant, C. D.; and with the assent of the said plaintiff the said C. D. confessed in open court that he is justly indebted to said plaintiff in the sum of \$——.* as claimed in the petition.

It is therefore considered by the court that the plaintiff, A. B., recover from said defendant the said sum of —— dollars, together with his costs herein expended, taxed at \$——.

247. (Sec. 5322.) *Judgment where no petition has been filed.*

[Title.]

As in last to *, and continue:]—as evidenced by the promissory note of said C. D., executed by him on the —— day of ——, 18—, for the sum of \$——, payable to the said plaintiff six months after the date thereof. [Or other brief statement.]

It is therefore considered, etc. [as in last.]

WHEN DEFENDANT APPEARS BY ATTORNEY—

248. (Sec. 5324.) *Judgment.*

[Title.]

Now came the plaintiff, by his attorney; also came O. T., one of the attorneys of this court, on behalf of the defendant, C. D., and, by virtue of a warrant of attorney for that purpose, duly executed by the said C. D., and now produced to the court, waived the issuing and service of process, and, with the assent of the plaintiff, confessed that the said C. D. is justly indebted to the said plaintiff in the sum of —— dollars. [Continue as from *, in one of the last two entries, according to circumstances.]

[Signed,] O. T.,¹*Attorney in fact for C. D.*

¹ Signed by attorney. See above.

CHAPTER IV.

MANNER OF GIVING AND ENTERING JUDGMENT.

JUDGMENT ON VERDICT—

- 249. (Sec. 5326.) For money, for either party.
- 250. (Sec. 5326.) On verdict for defendant, for costs.
- 251. (Sec. 5327.) On special verdict.
- 252. Motion for new trial overruled, and judgment on general verdict
- 252a. Same, on special verdict.

JUDGMENT ON THE PLEADINGS AND NOTWITHSTANDING VERDICT—

- 253. (Sec. 5328.) Judgment on the pleadings for plaintiff[or, defendant].
- 254. (Sec. 5328.) Same—and case referred to take an account.
- 255. (Sec. 5328.) Same—and case sent to jury to assess damages
- 256. (Sec. 5328.) Judgment for plaintiff, notwithstanding verdict.
- 257. (Sec. 5328.) Same—when damages have been assessed by the jury
- 258. (Sec. 5328.) Same—and inquiry of damages by jury ordered.
- 259. (Sec. 5328.) Judgment for defendant, notwithstanding verdict.

JUDGMENT ON PART OF VERDICT BEING REMITTED—

- 260. Remittitur of part of verdict—motion overruled, and judgment.
- 261. Order for new trial, unless, etc., and judgment

INQUIRY OF DAMAGES, AFTER JUDGMENT BY THE COURT—

- 262. Verdict on assessment of damages.
- 263. Judgment on the assessment.

JUDGMENT ON VERDICT—

When a trial by jury has been had, and a verdict rendered, three days are usually allowed for the losing party to move for a new trial. If no motion is made, judgment must then be entered by the clerk, in conformity to the verdict, unless the verdict is special, or the court order the case to be reserved for future argument or consideration.¹

Where the verdict is special, or where there has been a special finding on particular questions of fact, or where the court has ordered the case to be reserved, it shall order what judgment shall be entered.²

If a motion for a new trial be made and overruled, judgment follows, and is entered by the clerk as a matter of course.

Whatever may be the amount of the verdict, the plaintiff is entitled

¹ Code, sec. 5326.

² Code, sec. 5327.

to judgment; but as to costs, if the recovery be less than one hundred dollars, judgment for the plaintiff's costs can not be rendered, unless the jury have found the amount of the plaintiff's claim to be more than one hundred dollars, and have reduced the same, by the allowance of a counterclaim or set-off, to less than one hundred dollars.¹

In such case, it is well to add to the judgment entry, instead of judgment for costs as follows:

Order :]

And the plaintiff's said recovery being less than one hundred dollars, execution is awarded against each party for his respective costs.

249. (Sec. 5326.) *Judgment on verdict for money, for either party.*

[*Title.*]

The jury in this action, having, on a former day of this term, rendered a verdict for the —, and assessed his damages at \$—, and no motion for a new trial having been made :

It is therefore considered by the court that the said — recover from the said — the said sum of — dollars, together with his costs herein expended.

250. (Sec. 5326.) *Judgment, on verdict for defendant, for costs.*

[*Title.*]

The jury in this action having on a former day of this term, rendered a verdict for the defendant, and no motion for a new trial having been made :

It is therefore considered by the court that the said defendant go hence without day, and recover from the plaintiff his costs herein expended.

251. (Sec. 5327.) *Judgment on special verdict.*

[*Title*]

The jury in this action having, on a former day of this term, rendered a special verdict, and no motion for a new trial having been made, the court find * that the law arising

¹ Brunaugh v. Worley, 6 Ohio St. 597. See sec. 5349.

upon the facts so found by the jury is with the plaintiff [*or, defendant*], and that the — is indebted to — in the sum of — dollars:

It is therefore, in accordance with the special finding and verdict of the said jury, considered by the court that the — recover from the — the said sum of — dollars and his costs herein expended [*or such other judgment as is given by the court*].

252. *Motion for new trial overruled, and judgment on general verdict.*

[*Title.*]

This cause coming on for hearing, on the motion of the — to set aside the verdict, and for a new trial herein, the court, on consideration thereof, overrule the same.

It is therefore considered by the court that the said — recover from the said — the said sum of — dollars, as heretofore, by the verdict of the jury, found due him, with interest from [*the first day of the term of the verdict*], together with his costs herein expended.

Or, if for defendant :

It is therefore considered by the court, that the said defendant go hence without day, and recover from the said plaintiff his costs herein expended.

252a. *Motion for new trial overruled, and judgment on special verdict.*

[*Title.*]

And now this cause coming on for hearing on the motion to set aside the special verdict herein, and for a new trial, the court, on consideration thereof, overrule the same; and the court further find [*conclude us from *.* in *Entry No. 251.*]

JUDGMENT ON THE PLEADINGS AND NOTWITHSTANDING VERDICT—

Judgment *non obstante veredicto* at common law, and as recognized in Ohio before the code, was given, on motion, to the plaintiff, when the issue presented by the defense, and, by the verdict of the jury, found for the defendant, was not sufficient in law to avoid the plaintiff's

claim; when the plea of the defendant was bad in substance and might have been made the subject of demurrer on that ground.¹

It could only be rendered for the plaintiff, the defendant's corresponding remedy being arrest of judgment.²

At common law the judgment was interlocutory, after which a writ of inquiry was executed, and the final judgment signed as in ordinary cases.³ So, in Ohio, a writ of inquiry would usually issue; but if the jury had sufficiently passed upon the whole matter, and assessed the plaintiff's damages, such writ was not required to issue, and judgment was rendered for the damages assessed.⁴

Section 5328 of the code allows either party to have judgment where, upon the statements in the pleadings, he is entitled by law to it, notwithstanding that a verdict has been found against such party. The code is silent as to how the damages of the party entitled to judgment shall be determined in a case requiring their determination; but it would probably be correct practice for the court to act as allowed by section 5320 in cases of default, and either find the amount due, or refer the case to a referee or master, or send to a jury.

253. (Sec. 5328.) *Judgment on the pleadings for plaintiff [or, defendant].*

[*Title.*]

And now this cause being heard upon the pleadings filed in the case, and the motion of the plaintiff [or, defendant] for judgment thereon, the court finds that said plaintiff [or, defendant] is entitled to a judgment upon the statements in the pleadings.* and that the defendant is indebted to plaintiff in the sum of — dollars.

It is therefore considered by the court that the plaintiff recover from the defendant the said sum of — dollars, together with his costs herein expended.

Or, if for defendant, say:—that the defendant go hence without day, and recover from the plaintiff his costs herein expended.

¹ Steph. Comm. 659; 2 Tid. & Pr. 922; Sikes v. Van Dike, 17 Ohio, 454.

² Buckingham v. McCracken, 2 Ohio St. 287; Smith v. Smith, 4 Wend. 468.

³ C. L. P. A. 1872, s. 145; 2 Chit. Arch. Prac. by Pren. 1483.

⁴ Sikes v. Van Dike, 17 Ohio, 454.

254. (Sec. 5328.) *Judgment on the pleading, and case referred to take an account.*

[*Title.*]

*As in last entry to *, and continue :*] And it being necessary that an account should be taken between the parties before the amount due can be ascertained, it is now ordered that the case be referred for the taking of the same to E. F., as referee [*or say, a master commissioner of this court*], and that he report to this court without unnecessary delay.

For judgment on the coming in of the report, modify Entry No. 237.

255. (Sec. 5328.) *Judgment on the pleadings, and case sent to jury to assess damages.*

[*Title.*]

*As in Entry No. 253 to *, and continue :*]—and is entitled to recover his damages from the said defendant. And it is ordered that the case be sent to the jury to ascertain and assess the same.

The entry of verdict on the above assessment may be as in Entry No. 262, and the judgment on verdict as No. 263.

256. (Sec. 5328.) *Judgment for plaintiff notwithstanding verdict.*

[*Title.*]

After entry showing verdict for defendant, for which see page 56 or 57, continue :

And thereupon the plaintiff moved the court for a judgment upon the pleadings notwithstanding the said verdict. And the court being of opinion that the plaintiff is entitled to a judgment upon the statements in the pleadings, grant the said motion,* and the court thereupon further find that the defendant is indebted to the plaintiff in the sum of — dollars.

It is therefore considered by the court that the plaintiff recover, etc.

257. (Sec. 5328.) *Same, when damages have been assessed by the jury.*

[Title.]

*As in No. 256, to *, and continue:]*—And the jury having assessed the plaintiff's damages at \$—— :

It is therefore considered that the plaintiff, A. B., recover from the defendant, C. D., the said sum of \$—— and his costs herein expended.

258. (Sec. 5328.) *Same, and inquiry of damages by jury ordered.*
[Title.]

*As in Entry No. 256 to *, and continue:]*

It is therefore considered by the court that the said plaintiff recover from the said defendant his damages sustained by reason of the premises. And on motion of the plaintiff it is ordered that the case be sent to a jury to ascertain and assess the same.

For the subsequent entries on the assessment of damages, and judgment for the amount assessed, use Entries No. 262 and No. 263.

259. (Sec. 5328.) *Judgment for defendant notwithstanding verdict.*
[Title.]

After entry showing verdict for plaintiff, for which see pages 56 and 57, continue:]—

And thereupon the defendant moved the court for a judgment upon the pleadings, notwithstanding the said verdict; and the court being of opinion that the defendant is entitled to judgment upon the statements in the pleadings, grant the said motion.

It is therefore considered by the court that the defendant, C. D., go hence without day, and recover from the plaintiff, A. B., his costs herein expended.

For judgment under section 5329, see Entry No. 210a.

260. *Remittitur of part of the damages found in a verdict, motion overruled, and judgment for balance.¹*

[Title.]

This cause coming on to be heard on the motion to set

¹ See *Durrell v. Boyd*, 9 O. St. 72.

aside the verdict and for a new trial, and the court being of opinion that the damages assessed by the jury are excessive to the amount of — dollars, * and the plaintiff here in court now consenting to remit the excess aforesaid, thereupon the said sum of — dollars being remitted and deducted from the said verdict, the court overrule the motion for a new trial.

It is therefore considered that the plaintiff, A. B., recover from the defendant, C. D., the sum of — dollars, the residue of the damages by the said jury assessed, together with his costs herein expended.

261. *Order for new trial, unless remittitur be made; and judgment on remittitur.*

[*Title.*]

*As in last to *, and continue:*]—the court order that, unless the plaintiff will remit from the verdict the said sum of \$—, a new trial be granted: but that, upon said *remittitur* being made, the said motion be overruled.

And thereupon comes the said plaintiff, and in open court consents to said *remittitur*.

It is therefore considered, etc. [*as in last entry.*]

RECORD—

When record in any case is waived, it may be entered on the journal by adding to the judgment or entry of dismissal, by virtue of section 5337, as follows: “And by agreement of parties no record of this case is to be made.” Or, in a proper case, by simply adding “without record.”

261a. (Sec. 5334; 87 v. 236.) *Order to abbreviate record.*

[*Title.*]

Add to final entry:]

And it is ordered that in recording this case, the copies of papers attached to the petition, being voluminous, be only described therein and not recorded in full.

INQUIRY OF DAMAGES, AFTER JUDGMENT BY THE COURT—

There are three cases under the code in which a jury may be impaneled simply to assess damages, after the right to recover has been determined by the judgment of the court:

I. Where the court renders judgment for plaintiff by default, and sends the case to a jury for the assessment of damages, under section 5320.

II. In replevin, where the court renders judgment by default, and sends the case to a jury for inquiry of damages, under section 5825.

III. Where judgment is rendered by the court for the plaintiff, notwithstanding the verdict, and the case sent to a jury for the assessment of damages, under section 5328.

In all of these cases, the entries of verdict and judgment may be as follows:

262. *Verdict on assessment of damages.*

[*Title.*]

And now this cause came on to be heard upon inquiry of damages for the plaintiff, as heretofore ordered by the court; and thereupon came the following-named persons as jurors, to wit:

1. A. B.

7. E. F.

2. C. D.

8. G. H.

etc.

etc.

who were duly impaneled and sworn according to law.

And thereupon, after hearing the evidence, argument, and charge of the court, the jury retired to their room, in charge of the sheriff, for deliberation.

And now come said jury in open court, with their verdict in writing, signed by their foreman, and say:

“We, the jury, upon inquiry of damages for the plaintiff in this action, do assess the same against the defendant at — dollars. [Signed.] A. B., *Foreman.*”

263. *Judgment on the assessment.*

[*Title.*]

The jury in this action having, at a former day of this court, upon an inquiry of damages for the plaintiff, assessed the same against the defendant at — dollars.

It is therefore considered by the court that the plaintiff, A. B., recover from the defendant, C. D., the said sum of — dollars, so found due, together with his costs herein expended.

CHAPTER V.

JUDGMENT FOR COSTS, AND ITS ENFORCEMENT.

SECURITY FOR COSTS—

- 264. (Sec. 5340.) Order to increase deposit.
- 265. (Sec. 5341.) Order for plaintiff to give.
- 266. (Sec. 5343.) Order for additional.
- 267. Action dismissed on failure, etc.
- 268. (Sec. 5344.) Judgment against surety.

RETAXATION OF COSTS—

- 269. Order for.

A general and standing order of the Court of Common Pleas, directing the clerk to issue execution for his own benefit and at the instance of any person entitled to costs, will authorize the clerk without any special order, to issue such execution.¹

The recovery of costs by one party against the other is unknown at common law. Each party there paid his own costs, and was presumed to pay each portion as it became due. Recovery is given only by statute.²

As between the clerk and the party, the party is at all times liable to the clerk for his own costs, whether he be adjudged to recover from the adverse party or not. And even though a case be dismissed at the cost of one party, the other is not discharged from his liability to the clerk for his own costs; his remedy is against the adverse party only. When a case is dismissed for want of jurisdiction of the subject-matter, the court can only strike the case from the docket, and can render no judgment for costs.³

SECURITY FOR COSTS—

- 264. Sec. 5340; 86 O. L. 353.) *Order to increase deposit.*
[*Title.*]

On motion of the defendant, and the court being satisfied

¹ Elliott v. Ellery, 11 Ohio, 206. For the order adjudged sufficient, see page 152, Executions.

² Farrier v. Cains, 5 Ohio, 45.

³ Norton v. McLeary, 8 Ohio St. 295.

that the deposit of money made with the clerk of this court as security for costs in this case is not sufficient therefor, it is hereby ordered * that said sum be increased to — dollars. And that in default thereof for — days, the case be dismissed.

*Or.**—that the plaintiff be required to give personal security for said costs within — days, and that in default thereof the case be dismissed.

265. Sec. 5341.) *Order for plaintiff to give security for costs.*

[*Title.*]

This cause being heard upon the motion of defendant to compel the plaintiff to give security for costs, the court, on consideration, grants the same; and orders that unless plaintiff shall give said security within — days from this date, the action be dismissed.

266. (Sec. 5343.) *Order for additional security.*

[*Title.*]

This cause being heard on the motion to require the plaintiff to give additional security for costs, the court, on consideration, grants the same, and orders that this action be dismissed, unless the security be given within — days.

267. *Action dismissed on failure, etc.*

[*Title.*]

The plaintiff having failed to give the security [*or, additional security*] for costs heretofore required by order of court, this action is now, on motion, dismissed at plaintiff's cost [without prejudice to a future action.]¹

268. (Sec. 5344.) *Judgment against surety for costs.*

[*Title.*]

This cause coming on for hearing on the motion of the defendant [*or, other person having the right to the costs*] for judgment against the surety for costs in this action, the court finds that the said costs still remain due and unpaid, to wit, to the

¹ May be added by, see 5314, 5.

clerk of this court the sum of — dollars, and to this defendant the sum of — dollars; and that M. J., the surety herein, is liable therefor. And the said M. J. having been duly notified of this motion:

It is therefore considered by the court that the said C. D. recover from the said M. J. the said sums above found due, for the use and benefit of himself and the said clerk; and execution is awarded therefor, as well as for the costs in this behalf.

RETAXATION—

This order is granted for good cause, on motion of either party. The order sometimes directs how the costs shall be taxed.

269. *Order for retaxation.*

[*Title.*]

On motion of the defendant, by his attorney, it is ordered that the clerk retax the costs in this case, charging to the defendant the costs of his own witnesses only, and to the plaintiff all other costs; and that execution issue accordingly.

CHAPTER VI.

NEW TRIAL, AND OTHER RELIEF AFTER JUDGMENT.

270. (Sec. 5354, 1.) Judgment for a new trial.

271. (Sec. 5354.) Judgment adverse to new trial.

272. (Sec. 5354, 3.) Judgment vacated on motion after the term, for mistake, etc.

273. (Sec. 5354, 4, etc.) Judgment vacating former judgment for fraud, etc.

274. (Sec. 5355.) New trial granted to defendant constructively summoned.

A judgment may be vacated after the term has passed, on motion,¹ or on petition.² If done by motion, it is a part of the proceeding of the original case.

¹ Code, sec. 5357.

² Code, sec. 5309, and 5358.

If by petition, it is not of itself a civil action, but a special proceeding in an action after judgment, and subject to review only on error.¹ The only thing to be done in the original case is to refer on the appearance docket from the original case to the new one setting aside the judgment. And the latter case should be recorded as a part of the original.

270. (Sec. 5354, 1, 82 O. L. 34.) *Judgment for a new trial, in a case where final judgment has been entered.*²

[*Title.*]

This cause now coming on for hearing upon the petition to vacate the judgment heretofore rendered by this court, and for a new trial, in case numbered —, wherein the said A. B. is plaintiff and the said C. D. defendant, and the evidence, the court find that the grounds for a new trial set up in said petition are such as could not with reasonable diligence have been discovered at the term when the verdict [*or, report, or, decision*] was rendered [*or, made*], and that, by reason of said facts, the plaintiff herein is entitled to have the verdict rendered [*or, report, or decision made*] in said case, and the judgment thereon, set aside.

And the court further finding that the plaintiff herein has a valid defense³ [*or, cause of action*] in said case, it is therefore considered that the said verdict [*or, report, or, decision*] and the judgment in the case above named be, and the same hereby are vacated and set aside, and a new trial of the cause is granted.

[*Add any order the court makes as to costs.*]

271. (Sec. 5354, 82 O. L. 34.) *Judgment adverse to new trial.*

[*Title.*]

[*Use entry No. 196a.*]

For entry under subdivision 2 of sec. 5354, see Entry No. 274.

¹ Taylor v. Fitch, 12 Ohio St. 169.

² If final judgment has not been entered, use Entry No. 196.

³ Code, sec. 5360. See also Watson v. Paine, 25 Ohio St. 340.

272. (Sec. 5354, 3, 82 O. L. 34.) *Judgment vacated, on motion, after the term, for mistake of clerk, etc.*

[Title.]

This cause being heard on the motion of the defendant [or, plaintiff] to vacate the judgment rendered herein at a former term of this court, to wit, on January 4, 1871, the court, on consideration, find that [here state cause of vacating judgment], and that the said — has a valid defense¹ [or, cause of action].

It is therefore ordered by the court that the said judgment be, and the same hereby is, vacated, and a new trial is granted.

273. (Sec. 5354, 4, 5, 6, 7, 8, 9, and 10, 82 O. L. 34, and sec. 5358.) *Judgment vacating former judgment for fraud, etc.*

[Title.]

This cause now coming on for hearing upon the petition to vacate the judgment heretofore rendered in this court in case numbered —, wherein the said A. B. was plaintiff and the said C. D. defendant, and the evidence, the court find that [state one of the causes named in one of above subdivisions], and that the plaintiff herein, by reason thereof, is entitled to have the judgment in said case vacated. And the court further finding that this plaintiff has a valid defense¹ [or, cause of action] therein, it is therefore ordered that the judgment in the case above named be and it hereby is vacated, and a new trial of the cause is granted.²

[Add any order the court makes as to costs.]

274. (Sec. 5355.) *New trial granted to defendant constructively summoned.*

[Title.]

Now come the parties [or, comes the defendant herein], and thereupon [due notice having been given to plaintiff], this

¹ Code, sec. 5360. See also *Watson v. Paine*, 25 Ohio St. 340.

² Where a judgment is vacated, on petition, under the code, sec. 536 (5358), a new trial must be ordered. *Whitehead v. Post*, Logan Common Pleas, 1861, 3 W. L. M. 195. See this case for a full construction of sec. 536 (sec. 5358).

cause being heard upon the motion to open the judgment heretofore rendered in the action, the court find that no other service was made in the case than by publication in a newspaper; and being satisfied that during the pendency of the action the said defendant had no actual notice thereof, and that he has a valid defense,¹ the court therefore order that the said judgment be, and the same hereby is, set aside [upon payment by the defendant of all costs accrued herein], and the answer now offered to the court is received and filed.

For injunction proceedings, provided for in section 5361, see subject, INJUNCTION.

CHAPTER VII.

REVIVOR OF, AND NEW PARTIES TO JUDGMENT.

NEW PARTY TO A JUDGMENT—

275. (Sec. 5366.) Judgment making person not originally served party to a judgment.

REVIVOR OF JUDGMENT, DORMANT BY LAPSE OF TIME—

276. (Sec. 5367.) Conditional order, on motion filed.
 277. (Sec. 5367.) Same, when payments have been made.
 278. (Sec. 5367.) Final order, on motion.
 279. (Sec. 5367.) Final order, when payments have been made.
 280. (Sec. 5367.) Judgment of revivor on petition filed.

REVIVOR, WHEN PARTY DIES AFTER JUDGMENT AND BEFORE SATISFACTION—

281. (Sec. 5369.) Representative made party, on petition filed.
 281a. (Sec. 5369.) Same, on motion.
 282. (Sec. 5369.) Conditional order of revivor.
 283. (Sec. 5369.) Final order.
 283a. (Sec. 5369.) Revivor by consent.

NEW PARTY TO A JUDGMENT—

275. (Sec. 5366.) *Judgment making person not originally served party to a judgment.*

[Title.]

Finding, I., II., or III., page 99, or if by default Finding IV., page 100, and continue:]—and further find that this defendant

¹ By sec. 5360.

is jointly indebted upon the contract [*or, other instrument in writing*] set forth in the petition with the said E. F., in manner and form as in said petition declared.

It is therefore considered that the said C. D. be made a party to the judgment aforesaid rendered against the said E. F., in case No. — of this court, to wit, for the sum of — dollars, with interest from the — day of —, 18—, and costs of suit; and that the said A. B., upon the same judgment, have his execution against the said C. D.; and that he also recover from the said C. D. his costs in this behalf expended.

REVIVOR OF JUDGMENT, DORMANT BY LAPSE OF TIME—

Judgments having become dormant were, before the code, revived by the writ of *scire facias*; and, by analogy, the decisions of the Supreme Court under those statutes may, to some extent, be applied to revivor under the code.

Under the statute (3 Chase, 1684), the Supreme Court held that the revivor was only a continuation of the former suit, and not an original proceeding. That if the defendant made default, and no payments appeared upon the record, it is the duty of the court to award execution for the amount of the original judgment.¹

Under the code, it is probably the correct practice to revive the judgment as originally rendered, and not to calculate interest to the term when the revivor is made.

If payments have been made on the original judgment, they should be found in the order of revivor, with their times and amounts.

276. (Sec. 5367.) *Conditional order of revivor, on motion filed.* [Title.]

Now comes the plaintiff herein, and on his motion, and it appearing to the court that the judgment heretofore rendered in this action, to wit, at the — term, 18—, for the sum of \$—, with interest and costs, has become dormant by lapse of time.* and still remains wholly unpaid, it is ordered that said judgment be revived, unless sufficient cause be shown

¹ Wolf v. Pounsford, 4 Ohio, 397.

against the same within — days¹ after the service of this order upon the said defendant.

277. (Sec. 5367.) *Conditional order of revivor when payments have been made.*

[Title.]

As in last to, and continue:*—but that certain payments have been made on said judgment, to wit, the sum of \$—, on the — day of —, 18—, and the sum of \$—, on the — day of —, 18—, and that the balance still remains unpaid; it is therefore ordered that said judgment be revived, unless sufficient cause be shown against the same within — days after the service of this order upon said defendant.

278. (Sec. 5367.) *Final order of revivor, on motion.*

[Title.]

Now comes the said plaintiff, and the conditional order of revivor herein having been duly served upon the said defendant, and the said judgment still remaining unsatisfied, and no [or, no sufficient] cause being shown why it should not be revived:

It is therefore ordered that the said judgment, to wit, rendered in this action at the — term, A. D. 18—, for the sum of \$—, with interest from the — day of —, 18—, and \$— costs of suit, stand revived; and execution is allowed to issue accordingly, and also for the costs in this behalf expended.

279. (Sec. 5367.) *Final order when payments have been made.*

[Title.]

Now comes the said plaintiff, and the conditional order of revivor herein having been duly served upon the said defendant, and it further appearing that on the — day of —, 18—, there was paid on said judgment the sum of \$—; also, that on the — day of —, 18—, there was further paid the sum of \$—, and that the balance remains due and

¹ By sec. 5152 the service upon the order will be made in the same manner, and returned in the same time as a summons, which time of return, by sec. 5039, is the second Monday after its issue. Then the time for showing cause should be placed far enough ahead to give reasonable time for defendant to appear.

unsatisfied, and no [*or*, no sufficient] cause being shown why said judgment should not be revived :

It is therefore ordered that said judgment, to wit, rendered in this action, at the — term, A. D. 18—, of this court, for the sum of \$—, with interest from the — day of —, 18—, and \$—, costs of suit, do stand revived ; but that the payments above set forth be credited upon said judgment, in the manner prescribed by law. And execution is allowed to issue accordingly, as well as for the costs in this behalf expended.

280. (Sec. 5367.) *Judgment of revivor on petition filed.*

[*Title.*]

This cause now coming on for hearing on the petition for a revivor of the judgment formerly rendered in case numbered — in the [*name court*], wherein the said A. B. was plaintiff and C. D. defendant, and the said defendant having been duly served with summons herein, and no [*or*, no sufficient] cause being shown why the said judgment should not be revived :

It is therefore considered by the court that the said judgment, to wit, rendered in case No. — in this court, at the — term, 18—, in favor of this plaintiff and against this defendant for — dollars, with interest from the — day of —, 18—, and \$— costs of suit, do stand revived.

It is further considered that the plaintiff recover from the defendant his costs herein expended. For all of which execution is awarded.

REVIVOR, WHEN PARTY DIES AFTER JUDGMENT AND BEFORE SATISFACTION.

In this case a judgment may be revived by sec. 5369, as amended, 82 O. L. 34.

1. By the representative, real or personal or both, being made parties to the judgment by action brought for that purpose.

2. By such representatives being made parties to the judgment in the same manner as is prescribed for the revival of actions before judgment.

The manner prescribed for making the representatives parties to the action before judgment is found in secs. 5149, 5152, and is

- a. By allowance on motion, sec. 5149.
- b. By supplemental pleadings naming the representatives, and service, sec. 5149.
- c. By conditional and final order of revivor, secs. 5150, 5152.
- d. By a consent order of revivor, sec. 5152.

The entries in the above cases will be given successively.

281. (Sec. 5369, 82 O. L. 34.) *Representatives made parties on petition filed.*

[Title.]

This cause now coming on for hearing on the petition for a revivor of the judgment rendered in case numbered — in this court, wherein A. B. was plaintiff and C. D. defendant for the sum of — dollars and costs of suit, and it being shown to the court that said judgment is still unsatisfied, and the defendant has died since its rendition, and that E. F., the defendant in this action, is the duly appointed and qualified executor [*or other representative*] of the said C. D., and that he has been duly served with summons herein, and no [*or, no sufficient*] cause being shown to the contrary, it is therefore ordered that the said E. F. executor as aforesaid be, and he hereby is, made party defendant to the judgment aforesaid, and execution is awarded against him; and it is ordered that he pay the cost of this action.

281a. (Sec. 5369, 82 O. L. 34.) *Representative made party to judgment, on motion.*¹

[Title.]

Now comes E. F. and suggests to the court the death of A. B., the plaintiff [*or, C. D., the defendant*] herein, since the rendition of the judgment, and that he is the duly appointed and qualified administrator [*or, other representative*] of the said —, and moves the court for leave to become a party to the judgment; and the court finding the suggestion to be true, grant said motion; and said E. F., administrator as aforesaid, is accordingly made a party to the said judgment [and execution is awarded in his favor.]

¹As by sec. 5149.

Probably the representatives may be made parties by supplemental pleadings, as provided for in sec. 5149, but as pleadings will seldom be filed after judgment no forms are given.

282. (Sec. 5369, 82 O. L. 34.) *Conditional order of revivor—party dying after judgment.*¹

[*Title.*]

Now comes R. W. [*or*, the plaintiff], and suggests to the court that the plaintiff [*or*, the defendant] herein has died since the rendition of the judgment in the action, and that he, the said R. W. [*or*, that M. N.] has been duly appointed and qualified as the executor of the last will and testament of the said plaintiff [*or*, defendant]; and the court being satisfied thereof, and that said judgment remains unsatisfied, now, on motion of the said R. W. [*or*, plaintiff], it is ordered that he [*or*, the said M. N.], as such executor, be made party plaintiff [*or*, defendant], instead of the said A. B. [*or*, C. D.], deceased, to the judgment aforesaid, to wit, rendered in this action at the ——— term, A. D. 18—, of this court, for the sum of \$—— damages, with interest from the ——— day of ———, A. D. 18—, and \$——, costs of suit, unless sufficient cause be shown against said revivor within ——— days² after service of this order upon the said defendant [*or*, the said M. N., executor].

283. (Sec. 5369, 82 O. L. 34.) *Final order of revivor—party dying after judgment.*

[*Title.*]

Now comes the said R. W. [*or*, plaintiff], and the conditional order of revivor herein having been duly served upon the said defendant [*or*, M. N.], and said judgment still remaining unsatisfied, and no [*or*, no sufficient] cause being shown why it should not be revived, it is now ordered that the said R. W. [*or*, M. N.], administrator as aforesaid, be, and he hereby is, made party plaintiff [*or*, defendant], instead of the said A. B. [*or*, C. D.], deceased, to said judgment, to wit,

¹See secs. 5150 and 5151.

²See note 1, page 148.

rendered in this action at the — term, A. D. 18—, of this court, for the sum of \$—, with interest from the — day of —, A. D. 18—, and costs of suit; and execution is awarded accordingly, and also for the costs in this behalf expended.

283a. (Sec. 5369, 82 O. L. 34.) *Revivor of judgment by consent.*

[*Title.*]

Now comes the plaintiff and suggests to the court that the defendant, against whom judgment was rendered herein, has died, and that the judgment remains unsatisfied, and also that E. F. has been duly appointed and qualified as executor of said defendant. And the court being fully satisfied thereof and the said E. F., executor as aforesaid, consenting, it is hereby, on motion of the said plaintiff, ordered that the judgment stand revived against the said E. F., executor as aforesaid, and execution is awarded accordingly.

DIVISION V.—ENFORCEMENT OF JUDGMENT.

CHAPTER I. EXECUTION.

II. PROCEEDINGS IN AID OF EXECUTION.

CHAPTER I.

EXECUTION.

SUBDIVISION II. EXECUTION AGAINST PROPERTY.

III. EXEMPTION FROM EXECUTION.

V. EXECUTION AGAINST THE PERSON.

VI. PRIVILEGE FROM ARREST.

SUBDIVISION II.—EXECUTION AGAINST PROPERTY.

STANDING ORDER FOR EXECUTION FOR COSTS.

284. Leave for sheriff to amend his return.

285. (Sec. 5387.) Order to sell chattels at private sale.

APPRAISEMENT AND SALE OF LANDS AND TENEMENTS—

286. (Sec. 5394.) German advertisement dispensed with.

287. (Sec. 5394.) Advertisement in Bohemian paper ordered.

288. (Sec. 5398.) Decree of confirmation—order for deed and distribution.

289. (Sec. 5399.) Order for master to convey.

290. (Sec. 5404.) Order to sell on premises.

291. (Sec. 5407.) Order for succeeding sheriff to make deed.

292. (Sec. 5412.) Vacating satisfaction of judgment.

293. (Sec. 5413.) Same—in favor of officer.

294. Order for new appraisement.

295. (Sec. 5416.) Same—after land being twice offered.

296. (Sec. 5416.) Order directing sale for certain amount.

298. (Sec. 5438.) Re-appraisement of homestead ordered.

An execution is properly defined to be "the obtaining of actual possession of any thing acquired by judgment at law," and necessarily goes on all final judgments. There may be *special* cases requiring special executions, but in ordinary cases the right to have the usual execution follows every judgment as of *course*.¹

An execution is deemed a process of the court, and is issued by the clerk.² And when the clerk affixes the seal to the process, and issues it on the application of a suitor, it is the process of the court or the law, not that of the clerk, and the order of the court for its issue will be presumed.³ The fact of the writ being issued presupposes the order, and no other proof of the execution having been awarded is necessary.³

It is therefore not necessary to annex to the judgment entry an order awarding execution.

But, in the case of the clerk's costs, section 1321 provides that he "may, for his own benefit, or shall, at the instance of any person entitled to fees in the bill of costs taxed against either party, *and by order of the court*, issue against the party, etc." But the supreme court, in the case of *Elliott v. Ellery*, 11 Ohio, 306, decided that a special award in each case was not necessary where there was a standing order for execution.

The standing order adjudged to be sufficient was as follows :

STANDING ORDER FOR EXECUTION FOR COSTS.

Ordered, by the court, that, in all cases where the party recovering judgment in this court shall neglect to sue out execution immediately ; or, after execution shall have been returned without satisfaction of costs ; or, where costs are adjudged against either party on continuances, amendments, or any special rule, the clerk may, for his own benefit ; or at the instance of any person entitled to fees in the bill of costs, issue execution against the party indebted to such clerk or other person, for such fees, whether plaintiff or defendant, at any time after the expiration of the time given for the payment of the same, agreeably to the act regulating the taxation and collection of costs ; and this is made a standing order of this court.

¹ *Darby v. Carson*, 9 Ohio, 149.

² Code, sec. 5372.

³ *Earl's Lessee v. Shoulder*, 6 Ohio, 409.

An execution will be set aside, on motion, when issued upon a dormant judgment,¹ or if improvidently issued.² It may also be amended when it mistakes the amount of the judgment.³

A sheriff's return upon an execution may, by leave of court, within a reasonable time in the discretion of the court, be amended.⁴

284. *Leave for sheriff to amend his return.*

[*Title.*]

Now comes G. H., sheriff of this court, and asks leave to amend his return on the execution issued in this action. And the court being satisfied of the propriety thereof, grants the same, and allows said sheriff to file an amended return.

285. (Sec. 5387.) *Order to sell goods and chattels at private sale.*

[*Title.*]

This cause coming on for hearing on motion of the — to sell at private sale, etc., on consideration thereof, and for good cause shown, it is ordered that the sheriff cause the goods and chattels levied on in this case to be appraised according to law, by three disinterested persons, and that he may then sell the same at private sale, for cash, within — days from this date, at not less than two-thirds of their appraised value.

APPRAISEMENT AND SALE OF LANDS AND TENEMENTS—

The court has the power when the appraisement of property was made probably under some misapprehension of the location of the property, or in ignorance of its value, and where justice to the parties manifestly requires it, to set it aside, and order a new appraisement to be made.⁵

Where a levy has been set aside, the parties stand just as though no levy had ever been made. Before the property which had been levied on can be sold, it must be seized again.⁶

¹ *Lytle v. Cincinnati Manufacturing Co.*, 4 Ohio, 459.

² *Buckingham v. Society*, 2 Ohio, 360.

³ *Waggoner v. Lessee, etc.*, 19 Ohio, 67, 104.

⁴ *Fowble v. Rayberg*, 4 Ohio, 59.

⁵ *Bates v. Junction R. R. Co.*

⁶ *Patton v. Sheriff, etc.* 2 Ohio, 396.

The court can confirm or set aside a judicial sale, but can not modify its terms.¹

286. (Sec. 5394.) *German advertisement dispensed with [in certain counties].*

[*Title.*]

On motion, and for good cause shown, advertisement in a German newspaper of the sale to be made in this case is hereby dispensed with.

287. (Sec. 5394.) *Advertisement in Bohemian paper ordered.*

[*Title.*]

On motion of the —, and it appearing for the best interests of the defendant herein, it is ordered that notice of the sale to be made in this case be published in the [*name paper*], a newspaper printed in the Bohemian language, in the same manner and for the same time as published in the English paper.

Make entries under section 5397—punishing a purchaser of real estate who fails to pay the purchase-money therefor—as under “CONTEMPTS OF COURT.”

288. (Sec. 5398.) *Decree of confirmation; order for deed and distribution.*

[*Title.*]

This cause came on to be heard on the return of the sheriff of the writ of execution issued herein, with his report of his proceedings and sale of lands and tenements under said writ. And the court, having carefully examined the said proceedings, being satisfied that the said sale has, in all respects, been made in conformity to the provisions of the statute in such cases made and provided, find the same to be legal,² and do, therefore, approve and confirm the same.

¹ Ohio Life Ins. and Trust Co. v. Goodin, 10 Ohio St. 557.

² Some attorneys consider it necessary, in drawing this decree, under the peculiar phraseology of sec. 5398, to make the order “that the clerk make an entry on the journal that the court is satisfied of the legality of said sale,” etc. but this clause seems clearly superfluous, because, when, as a matter of fact, the entry is made on the journal by the clerk, it is the act of the court; and it is

It is further ordered that the sheriff make to the purchaser, R. W., a deed,¹ according to law, for the property so sold, to wit [*describe*]. And the said purchaser is hereby subrogated to all the rights of any lienholder who shall be satisfied herein, for the protection of his title.² And a writ of possession is awarded to put the said purchaser in possession of said premises.³

And the court coming now to the distribution of the purchase-money in the hands of the sheriff, order that he pay—

First, to the treasurer of this county the taxes and penalty due upon the property so sold,⁴ to wit, the sum of \$——.

Second, to the clerk of this court the costs of this action, taxed at \$——.

Third, to the plaintiff, A. B., the amount of the judgment herein rendered, with interest to this date, to wit, the sum of \$——.

Fourth, to the defendant herein the balance of said purchase-money, to wit, the sum of \$——.

The order for distribution may, of course, be made as a separate entry, if desired.

289. (Sec. 5399.) *Order for master to convey.*⁵

[*Title.*]

It appearing that, by a former judgment of this court, the defendant in this case was ordered to convey to the plaintiff,

conclusively presumed that the clerk made it by direction of the court. Just as it was said in the case of *Earl's Lessee v. Shoulder*, 6 Ohio, 409, that, when an execution had been issued, the order, for its issue would be presumed.

¹ Unless the deed is ordered by the court, it will not be received as evidence of title. *Curtis v. Norton*, 1 Ohio, 278.

² See sec. 5410.

³ See note 6, page 117.

⁴ Sec. 2854. Held in *Hoglin v. Cohan*, 30 Ohio St. 436, that all taxes and penalties standing on the duplicate on the first day of the October preceding the day of sale, unless the sale is on October 1st, shall be paid out of the purchase money. If the sale is on October 1st, all taxes and penalties then so standing shall be paid out of such purchase-money.

⁵ The order for a master commissioner to make conveyance may be added to the decree for conveyance or may be made as a separate order, as in this entry.

by good and sufficient deed, certain real property in the petition herein described, and that said defendant has neglected and failed so to do, it is therefore, on motion of the plaintiff, ordered that the said conveyance be made by M. C., one of the master commissioners of this court, by deed conformable to the statute in such case made and provided.

290. (Sec. 5404.) *Order to sell on premises.*

[*Title.*]

It appearing to be for the best interests of all parties to this action, it is ordered that the sale in this case be made upon the premises, instead of at the court house.

291. (Sec. 5407.) *Order for succeeding sheriff to make deed.*

[*Title.*]

It appearing that the term of office of T. S., the sheriff who made the sale on execution of the lands herein sold, has expired, and sufficient proof having been made to the court that such sale was fairly and legally made, on motion, it is ordered that the clerk of this court certify the same to G. H., the present sheriff, who is directed on payment of the purchase-money to execute to the purchaser, A. P., a deed in fee simple for the said lands and tenements as in the former decree herein described.

For entry under sec. 5410, see DECREE OF CONFIRMATION.

292. (Sec. 5412.) *Vacating satisfaction of judgment.*

[*Title.*]

It being shown to the court that certain property levied on and sold in this case was not subject to levy, but was the property of L. W., and that the plaintiff herein has paid to said L. W. upon recovery had by him against this plaintiff in case No. —, in this court, the sum of \$—, and due notice of this motion being given to defendant herein, it is ordered that the satisfaction of the judgment herein be set aside (to the extent of the payment aforesaid) and held for naught, and that the judgment be restored with its former liens and priorities as before such entry of satisfaction.

293. (Sec. 5413.) *Same, in favor of officer*

[*Title.*]

And now this cause coming on to be heard upon the motion heretofore filed herein by C. F., sheriff of this county, for vacation of the satisfaction of the judgment rendered in this case and other relief, and the defendant herein having had due notice of said motion, the court finds that the said C. F. has paid the sum of \$—— upon a recovery had against him by L. W. in case numbered ——, in this court, by reason of a sale wrongly made by him of certain property belonging to said L. W., taken upon execution in this case, the proceeds of which were applied to the satisfaction of the judgment herein:

It is therefore ordered that the satisfaction of the judgment in this case (to the extent of the payment aforesaid) be vacated and held for naught, and execution is allowed to issue upon the same for the use and benefit of the said C. F.

294. *Order for new appraisement.*

[*Title.*]

This cause came on for hearing on the motion to set aside the appraisement of the real estate levied on in this action, and on consideration thereof, and good cause shown, it is ordered that the said appraisement be, and it hereby is, set aside; and it is ordered that a new appraisement of the same be made.

295. (Sec. 5416.) *Same, after land being twice offered.*

[*Title.*]

It appearing to the court that the real estate taken on execution herein has been twice advertised and offered for sale under the present appraisement, and still remains unsold for want of bidders, now, on motion of —— the said appraisement is hereby set aside, and it is ordered that a new one be made [or, the levy and appraisement heretofore made are hereby set aside, and a new execution awarded].

Order to sell on time may also be added, as follows:]

And on motion of the ——, and it appearing for the best interests of the parties, it is ordered that the sale be made

on terms of one-third cash, one-third in nine months, and one-third in eighteen months from the day of sale, the deferred payments to draw six per cent interest, and be secured by mortgage on the premises.

296. (Sec. 5416.) *Order directing sale for certain amount.*

[*Title.*]

It appearing to the court that the real estate taken on execution herein has been three times appraised, and thereafter twice advertised and offered for sale, and still remains unsold for want of bidders, it is now, on motion, ordered that the said real estate may be sold for the sum of — dollars, payable in cash [*or otherwise*].

For judgment against principal and surety under sec. 5419, see Entry No. 515.

SUBDIVISION III—EXEMPTION FROM EXECUTION—

298. (Sec. 5438.) *Re-assignment of homestead ordered.*

[*Title.*]

This cause now coming on for hearing on complaint of the — herein against the appraisement and assignment of homestead made by the sheriff in this case, the court finds, upon the evidence, that said complaint is well taken, and it is therefore ordered that a re-appraisement and a re-assignment of said homestead be made by said sheriff.

SUBDIVISION V—EXECUTION AGAINST THE PERSON.

299. (Sec. 5449.) *Order allowing.*

300. (Sec. 5456.) *Order for discharge in certain cases.*

299. (Sec. 5449.) *Order allowing.*

[*Title.*]

On motion, and a judgment having been heretofore rendered in this action in favor of the plaintiff against the defendant, C. D., for the sum of \$— and costs of suit, and the court being satisfied from the evidence that [*here state one of the causes in section 5448*], it is therefore ordered that an execution be allowed to issue against the person of the said

C. D., commanding the sheriff to arrest and commit the said C. D. to the jail of this county until he shall pay the said judgment, or be otherwise discharged according to law.

300. (Sec. 5456.) *Order for discharge in certain cases.*

[*Title.*]

It appearing that the defendant, C. D., heretofore committed to the jail of this county by an order of the court in this case, is entirely unable to pay the judgment against him [*or, unable to endure the imprisonment*], it is therefore ordered that the said C. D. be, and he hereby is, discharged from his said imprisonment. [*Add any special order that the court may make.*]

SUBDIVISION VI—PRIVILEGE FROM ARREST—

301. (Sec. 5461.) *Order of discharge, on motion.*

[*Title.*]

On motion of the defendant, C. D. herein, heretofore arrested in this case upon process sued out by A. B., and it appearing that such arrest was illegal for the reason that [*state reason given under this subdivision*], it is ordered that said C. D. be forthwith discharged from such arrest, and that the said A. B. pay all the costs of the proceedings in this behalf.

CHAPTER II.

PROCEEDINGS IN AID OF EXECUTION.

SUBDIVISION I. BY CIVIL ACTION.

III. BY EXAMINATION OF DEBTOR.

IV. BY ATTACHMENT.

SUBDIVISION I.—BY CIVIL ACTION.

302. (Sec. 5464.) Decree subjecting equitable interest, etc., to payment of debt.

The remedy given by section 5464 is one to be exercised by the chancery powers of the court, and the decree in an action under this section

may take so many different forms that too much space would be required to give them all. One form is given, and it can be modified to suit the other cases.

The following are some of the different courses which the decree may take:

1. A fraudulent sale may be declared void, and the property be sold by a master commissioner, and proceeds applied to payment of the judgment;¹ in which case the decree will be similar to those under section 6344.

2. The defendant may be compelled to disclose his means to pay the debt.² In this case the entries to be made will be similar to those under section 5472, and following sections.

3. Money in the hands of a third person or a corporation may be subjected under this section.³ In this case the proceedings to carry into effect the decree will be in the nature of proceedings in attachment.

4. Unpaid subscriptions of stock may be subjected to pay a judgment against the corporation.⁴ In such a case, a master may be appointed to report names of stockholders, amounts due, etc., and a receiver to collect amounts and pay debt. Or a judgment and execution may be entered and levied against any stockholder.⁵

5. Debtors of the defendant may be subjected to payment of plaintiff's judgment by a judgment and execution against each.⁶

6. The interest of a mortgagor may be sold, subjected to the payment of a judgment, and the cause may be first referred to a master to state an account and report the sum due and the value of the equitable interest.⁷

7. When a negotiable note in the hands of a debtor is subjected, the court ought, if possible, to compel the production of the paper, and if that can not be done, to suspend a decree in the premises until the maturity of the paper, and until the possible rights of third parties can be ascertained; because the party who receives it before due for value, and without actual notice of the pendency of the proceedings, is en-

¹ *Piatt v. St. Clair's Heirs*, 6 Ohio, 227. See in this case the decree in full.

² *Miers v. Turnpike Co.*, 11 Ohio, 273.

³ *City of Newark v. Funk*, 15 Ohio State, 462.

⁴ *Henry et al. v. Railroad Co.* 17 Ohio, 187.

⁵ *Warner v. Callender et al.*, 20 Ohio St. 195.

⁶ *Gilmore v. The Miami Bank*, 3 Ohio, 503. See in this case the decree in full entered by the Supreme Court.

⁷ *Mattocks v. Humphrey's Adm'r*, 17 Ohio, 336.

titled to the proceeds, notwithstanding the chancery proceeding to subject it.¹

302. (Sec. 5464.) *Decree subjecting equitable interest, etc., to payment of judgment.*

[*Title.*]

This cause came on to be heard upon the pleadings and the evidence, and the court, having fully considered the same, find that the plaintiff recovered a judgment for \$—— against the defendant, C. D., on the —— day of ——, 18——, in the Court of Common Pleas of —— county, and that he is still the owner thereof, as alleged in the petition; that said judgment remains unsatisfied, and that there is due thereon, with interest to the first day of this term, the sum of \$——, and also the sum of \$——, costs in said case; that said defendant has no personal or real property subject to levy on execution sufficient to satisfy said judgment,² and that he is the owner of an equitable interest, to wit [*describe*], in the following described real estate, viz. [*describe*].

And thereupon the court find that said plaintiff is entitled to have said interest subjected to the payment of the judgment aforesaid.

It is therefore considered and decreed that, unless the judgment aforesaid shall be paid within —— days, said equitable interest shall be sold, and that an order therefor shall issue to the sheriff of —— county, directing him to appraise, advertise, and sell said interest as upon execution against real estate, and report his proceedings to this court.

The subsequent entry of confirmation and distribution will be in the same form as in case of sale on foreclosure. See Entry No. 225.

¹ Stone v. Elliott, 11 Ohio St. 252-260.

² It is not necessary that an execution should have been issued. Bomberger v. Turner, 13 Ohio St. 263.

SUBDIVISION III.—BY EXAMINATION OF DEBTOR.

KINDS OF PROCEEDINGS—

1st. *When instituted without affidavit or proof.*

303. (Sec. 5472.) Order for defendant to appear.
Notice.

304. (Sec. 5477.) Order appointing referee after the appearance, etc.

2d. *When instituted upon affidavit or proof of property.*

305. (Sec. 5473.) Order for defendant to appear [made by a judge].

306. (Sec. 5473.) Order for defendant to appear [made by the court].

307. (Sec. 5477.) Appointing referee.

3d. *When commenced by an order of arrest.*

308. (Sec. 5474.) Order for arrest.

Warrant for arrest.

309. (Sec. 5474.) Order for undertaking.

310. (Sec. 5477.) Appointing referee.

4th. *Proceedings against third parties.*

311. (Sec. 5475.) Order for appearance of, after execution.

312. (Sec. 5475.) Order for appearance of, before execution.

APPLICATION OF PROPERTY DISCOVERED—

313. (Sec. 5483.) Order for, when in hands of defendant.

314. (Sec. 5483.) Order for, when in hands of third party.

315. (Sec. 5484.) Appointing receiver.

316. (Sec. 5486.) Order for receiver to sell.

317. Order for receiver to pay off judgment.

318. Order for receiver to apply funds.

MINUTES OF THE JUDGE—

NATURE OF THE PROCEEDINGS—

These proceedings are copied from the New York Code of Procedure, and their object is to subject to the payment of a judgment a class of personal property which is most easily concealed by a judgment debtor.

All the more recent decisions lean so decidedly in favor of regarding these proceedings as proceedings in the action where the judgment was

rendered, that this point is deemed settled in New York.¹ Our own code appears to contemplate the same construction; as, in case of a sale of the debtor's interest in any real estate, the proceedings of sale must be approved by the court in which the judgment was rendered, or the transcript filed.² And so, also, the judge before whom the proceedings are had is required to reduce his orders to writing, and, with a minute of his proceedings, to file them with the clerk of the county in which the judgment was rendered or the transcript filed,³ whether he be a member of the court of that county or not.

The judge who entertains the proceedings appears to act as a special judicial officer, and not as the court. And in New York it has been held that where authority has been given only to the *judge* to act, that the *court* has no power to.⁴

The Supreme Court of Kansas, however, holds that these proceedings had before the court are valid, because the court the greater includes the judge the less.⁵

Our own Supreme Court has not passed on this question, but the reasons given by Lawrence, J., in the case of Welch v. P., Ft. W. & C. R. R. Co., in the Common Pleas Court of Allen county (1859), reported in 1 W. L. M. 143, seem sufficient to warrant us in following the New York decisions, and in holding that where the statute authorizes a judge only to sit in these proceedings, he sits not as a *court*, but simply as a judge. This power conferred on him by the legislature is directly authorized by article 4, section 18, of the constitution, which authorizes powers to be given to a judge distinct from those given to the court by section 4 of the same article.

The proceedings when not instituted in the *court* in which the judgment was rendered,⁶ may have the original title, or the following:

In the matter of proceedings in aid of execution in the case of A. B. v. C. D., No. }
 ———, of the Court of Common Pleas of }
 ——— county, Ohio. }

¹ The New York decisions here cited are mostly collated from "Supplementary Proceedings," by Daniel S. Riddle, of the New York bar.

² Code, sec. 5486.

³ Code, sec. 5487.

⁴ Miller v. Rosseman, 15 How. 10.

⁵ Kiser v. Sawyer, 4 Kan.

⁶ Code, sec. 5473.

KINDS OF PROCEEDINGS—

These proceedings may be considered under four heads :

- 1st. When instituted without affidavit or proof.
- 2d. When instituted upon affidavit of proof of property, etc
- 3d. When commenced by an order of arrest.
- 4th. Those against third parties.

1st. When instituted without affidavit or proof.

In this case the proceedings are had under section 5472, and only after an execution returned unsatisfied, in whole or in part. And the order can only be issued by a probate or common pleas judge of the county to which the execution was issued.

The judge, as a separate judicial officer, on application of the plaintiff, will make an order that the defendant appear and answer concerning his property either before himself or a referee appointed by him, at a time and place certain. This order must be reduced to writing,¹ and, with others, must be returned to the court wherein the judgment was rendered or transcript filed.¹ But is it not also an "order," under section 5310, to be entered by the clerk on the journal of the court of which the judge is a member, by virtue of section 4963? Perhaps not, from the fact that these are special proceedings, and are controlled specifically by the sections in this chapter; but it will do no harm so to enter this, and all subsequent orders of the judge, on the journal of the court. They are at any rate thus preserved from loss. But the judge should still file a record of his orders and proceedings with the clerk of the county where the judgment was rendered or transcript filed, in compliance with section 5487, even though the court be the one of which he is judge. A copy of this order will also be made out and be signed by the judge, and served upon the defendant as a summons in other cases.^{1 2}

The referee may be appointed to report the evidence or the facts.³

If it appears from the examination that the debtor has no such property as claimed by the plaintiff, the proceedings will be dismissed, for this fact is necessary to confer jurisdiction.⁴ And they should be dismissed at plaintiff's cost.

If property is discovered, orders will be made concerning it as hereafter shown.

¹ Code, sec. 5487.

² *U. Bank of Rochester v. U. Bank of Sandusky*, 6 Ohio St. 260.

³ Code, sec. 5477.

⁴ *Sacket v. Newton*, 10 How. 560.

303. (Sec. 5472.) *Order for defendant to appear.*

[*Title.*]

On motion of the plaintiff in the above-recited case, and it appearing that an execution against the property of the defendant, C. D., duly issued to the sheriff of this county, has been returned wholly [*or, in part*] unsatisfied.* it is hereby ordered that the said C. D. do appear before me [*or, before M. R., Esq., who is hereby appointed referee in this cause, to take the examination of the said C. D. in writing, and to report the evidence to me*],¹ at —, on the — day of —, 18—, at — o'clock —. M., to answer under oath concerning his property.

And the said C. D. is hereby enjoined and restrained from transferring, or in any way disposing of any of his property, money, or credits, until further order in the premises.²

On the above order, the judge will cause to be issued the following:

NOTICE.³

The State of Ohio, }
County of —. } ss.

To the sheriff of the county of —, greeting:

You are hereby commanded to notify C. D. that the following order has been made by me, to wit [*copy the preceding title and order in full*];⁴ and that he, the said C. D., be and appear before —, at the time and place in said order mentioned, and in all things observe and obey the same.

And at said time you will make due return of this order.

Witness: M. F.,

*Judge of the Court of Common
Pleas of — county, Ohio.*

¹ Code, sec. 5477; or the referee may be appointed "to report the facts" only, and the evidence need not be taken in writing. See 3 Law G. 251.

² By sec. 5484.

³ The sheriff will serve and return this notice like a summons. See sec. 5487.

⁴ Union Bank, etc. v. Union Bank, etc., 6 Ohio St. 260.

304. (Sec. 5477.) *Order appointing referee after the appearance, etc.*

[*Title.*]

The judgment debtor herein [*or any person having property of the judgment debtor, naming him*], having appeared [*or, been brought*] before me in supplementary proceedings in this action, I do hereby [*upon the consent of the parties herein*] appoint R. S., Esq., referee to take the evidence herein, and report the same to me [*or, report to me the facts.*]¹ And the said C. D. [*or other person*] is hereby ordered to appear and attend before the said R. S., at —, on the — day of —, 18—, at — o'clock,* for examination and discovery concerning his property.

Or, if the order is for the examination of a third party, conclude]:—*for examination and discovery concerning any property of the defendant, C. D., in his possession, or any debt due the said defendant from him.

2d. *When instituted upon affidavit or proof of property.*

The proceedings in this case may be commenced after issuing, and before return of an execution, under section 5473.

They may be had before a judge, as in the last section, or before the common pleas court of the county in which the order may be served. If made by a judge, the remarks under the last section are applicable to this.

If had before a court other than the one rendering the judgment, the proceedings should be entitled as on page 163, and be numbered and docketed as a case in the court entertaining the proceedings; and the orders made as other orders in the court, and entered on the journal. It is probable that the defendant should be served, not with a regular summons, but instead with an order signed by the judge, as in case the judge hears all the proceedings.²

A referee may be appointed to take the examination.³

If the proceedings are had before the court in which judgment was rendered, the order will be regularly entered on the journal as other orders. But it would still seem that the defendant should be brought

¹ If only the facts are to be reported, the evidence need not be taken in writing. See *Directors, etc. v. Woodruff*, 3 Law G. 251.

² Code, sec. 5487.

³ Code, sec. 5477.

in, by an order made and signed by the *judge*, in the same manner as when the judge alone entertains the proceedings. There is but one way pointed out for bringing the defendant in,¹ and that seems to apply to all cases.

Although this is the only section under which the *court* is directly authorized to act, the judge only being mentioned in all of the others, yet as the latter part of this section authorizes such proceedings to be had "for the application of the property of the judgment debtor toward the satisfaction of the judgment as are prescribed in this subdivision," it is probably intended that the court beginning proceedings under section 5473 shall have, in carrying on the examination thus begun, all the powers given to the judge by sections 5483, 5484, and 5486; otherwise, this latter clause would have no effect, so far as the court is concerned; and the court would be limited to the examination of the debtor, with no power to proceed a step further.

305. (Sec. 5473.) *Order for defendant to appear [made by a judge].*

[*Title.*]

On motion of the plaintiff in the above-recited action, and it appearing that an execution has been duly issued against the property of the defendant, C. D., and it further appearing by the affidavit of the said A. B. [*or other proof*], to my satisfaction, that the said C. D. has property which he unjustly refuses to apply to the satisfaction of the judgment in the above-recited action. ✱ [*conclude as from ✱ in Entry No. 303.*]

306. (Sec. 5473.) *Order for defendant to appear [made by the court].*

Use the last form, substituting the court for the judge.

The notice will be in the same form as under the last section, page 165.

307. (Sec. 5477.) *Order appointing referee.*

See Entry No. 304.

¹ Code, sec. 5487.

3d. *When commenced by an order of arrest.*

The proceedings in this case are instituted under section 5474.

The warrant is alternative to the orders under sections 5472 and 5473, and hence should not be accompanied with the order.¹

It can only be issued by a judge in the county in which the debtor resides or may be arrested. Must the *order* for the arrest be reduced to writing, under section 5487? Perhaps there is no absolute necessity for it, but it will avoid question and preserve the record in case the papers are lost, and it would therefore be better to treat this like all other orders made by the judge. Then, the order being made, the judge issues the warrant. The warrant should probably be signed by the judge and be issued by the clerk, as in ordinary cases,² and will be served by the sheriff.

Upon the appearance and examination of the debtor, he will be discharged from arrest unless the judge find that he has property which he unjustly refuses to apply to such judgment, or that there is danger of his leaving the state; and the discharge should be at the plaintiff's cost.

If either of the above facts is found, the order for an undertaking will be made, and the same proceedings also had as in cases of appearance without arrest.

The order and warrant will require the debtor to appear before the judge in the first instance, but afterward a referee may be appointed, as in other cases, to examine him concerning his property, as in Entry No. 304.

308. (Sec. 5474.) *Order for arrest.*

[*Title.*]

*As in No. 303 or 305 to ✽, and continue:—*and it further appearing from the affidavit of the said A. B. [*or otherwise*] that there is danger of the said C. D. leaving the state, it is therefore ordered that a warrant issue to the sheriff of this county for the arrest of the said C. D., and directing said sheriff to bring him before me, at —, on the — day of —, for examination concerning his intentions and his property.

¹ Andrews v. Wilson, 9 How, 39.

² Code, sec. 4959.

WARRANT OR ARREST.

The State of Ohio.)
 — county, (

To J. H. Esq., sheriff of our said county, greeting:

Whereas, the following order was this day made by me, to wit [*copy the above order*].

You are therefore commanded to take the said C. D., if he may be found in your bailiwick, and him safely keep, so that you have his body before me at the place and time above set forth: and have then and there this writ.

Witness: M. F.,

Judge of the Court of Common

Plas, — County, Ohio.

309. (Sec. 5474.) *Order for undertaking.*

[*Title.*]

This day came before me the said C. D., in custody of the sheriff, on the warrant of arrest heretofore issued by me, and being satisfied that there is danger that the said C. D. will leave the state [*or, conceal himself*] to avoid examination as judgment debtor in this case [*or, has property which he unjustly refuses to apply to the judgment herein*]; it is hereby ordered that the said C. D. enter into an undertaking in the sum of — dollars, with good and sufficient sureties, that he will, from time to time, as directed, attend before me [*or, before R. E., hereby appointed referee for that purpose*], for examination. And such undertaking being given, the said C. D. shall be discharged from the custody of the sheriff. And in default thereof, the said C. D. shall be committed to the jail of the county as for a contempt.¹

310. (Sec. 5477.) *Order appointing referee.*

See Entry No. 304.

4th. *Proceedings against third parties.*

These proceedings are had under section 5475. They can only be

¹ The order forbidding transfer of property, as in Entry No. 303, may also be added, if necessary.

had before a judge, upon affidavit or proof that the third party has property of the judgment debtor.

The orders will be similar in form to, and are subject to the same remarks as those under section 5472. A referee may also be appointed as under section 5472.

311. (Sec. 5475.) *Order for appearance of third party, after execution issued.*

[*Title.*]

On motion of the plaintiff in the above recited action, by his attorney, and it appearing that an execution has been duly issued upon the judgment herein against the property of the defendant, C. D. [and returned unsatisfied], and it appearing to my satisfaction that one E. F. has in his hands property of [*or, is indebted to*] the said C. D., it is hereby ordered * that the said E. F. appear before me,¹ and answer concerning the same, at —, on the — day of —, 18—, at — o'clock. [And it is further ordered that the plaintiff notify the said defendant, C. D., of the matters herein, so as to give him sufficient time to be present at such examination.²]

312. (Sec. 5475.) *Order for appearance of, before execution.*

[*Title.*]

On motion of the said A. B., by his attorney, and it appearing from the affidavit of the said A. B. [*or otherwise*] that E. F. has in his hands property of [*or, is indebted to*] the said C. D.; and it further appearing to my satisfaction that [*state one of the grounds of attachment in section 5521*], it is hereby ordered, * etc. [*conclude as from *, in last entry*].

The notice to the third party will be in form as under section 5472, page 165.

It may be sometimes advisable to annex to the order or notice a clause forbidding the transfer of property, as under section 5472, Entry No. 303, for the information of the party to whom it is issued.

¹ Or, by sec. 5477, he may be ordered to appear before a referee, as in Entry No. 303.

² At the option of the court.

APPLICATION OF PROPERTY DISCOVERED—

If it is discovered, upon examination, under any of the foregoing sections, that the debtor has property subject to execution, either in his own hands or in the hands of a third party, the judge or court may order that it be applied toward the satisfaction of the judgment.¹ But the order can not be enforced by attachment or imprisonment.^{2,3} The order of application fixes the right of the judgment debtor, so that if possession of the property is obtained, or the debt collected by the sheriff or receiver, under section 5484, the proceeds may be duly applied to the discharge of the judgment.³

It was held by the Supreme Court of Kansas, under section 479, Comp. L. 1862 [same as section 5483, Ohio Code], that the following order against one found indebted to the defendant in execution was authorized, viz.: "That the said John Arthur pay into the hands of the clerk of the court said sum of \$813.60." But the part of the order awarding execution against the garnishee to collect the money in case of default in the payment thereof to the clerk was not allowed.⁴

Where property sought by these supplementary proceedings can not be reached and directly applied upon the judgment, a receiver must be appointed:⁵ that is, where debts are to be collected, property to be converted into money, and conflicting claims determined.²

The appointment is made by the judge. But if the proceedings are instituted before the court, under section 5473, the receiver should be appointed by the court. If there is not sufficient authority, under these proceedings, for the court to make the appointment, still section 5587 gives sufficient. The duties of the receiver are similar to those in other cases.

313. (Sec. 5483.) *Order for application of property in the hands of debtor.*

[*Title.*]

And now, it appearing upon the examination of the said C. D., that he has certain property, not exempt from execution, to wit [*describe property*], it is hereby ordered that the

¹ Code, sec. 5483.

² *Edgerton v. Hanna*, 11 Ohio St. 323.

³ *Union Bank, etc. v. Bank, etc.*, 6 Ohio St. 254.

⁴ *Arthur v. Hale*, 6 Kan. 161.

⁵ Code, sec. 5484.

same be delivered [*or, paid over*] to —,¹ that it may be applied to the satisfaction of the judgment rendered against him, in favor of the said A. B.

314. (Sec. 5483.) *Order for application of property in the hand of third party.*

[*Title.*]

And now, it appearing upon the examination of the said E. F., that he has in his hands certain property not exempt from execution belonging to the said C. D., to wit [*describe*], [*or, that the said E. F. is indebted to the said C. D. in the sum of \$—*], it is hereby ordered that the same be delivered over [*or, paid*] to —,¹ that it may be applied to the satisfaction of the judgment rendered against the said C. D. in favor of the said A. B.

To either of the last two orders may be added the appointment of a receiver of the property of the judgment debtor, or the appointment may be made by a separate entry.

315. (Sec. 5484.) *Order appointing receiver.*

[*Title.*]

It appearing from the examination of the judgment debtor herein [*or, of E. F.*] before me [*or, R. S., Esq., referee, who has filed the report of his proceedings*], that there is certain property not exempt from execution in the hands of the said C. D. [*or, E. F. belonging to the said C. D.*], which can not be directly applied upon the said judgment, on motion of the said —, it is hereby ordered that G. H. be, and he hereby is, appointed receiver herein, * of all the debts, property, equitable interests, rights, and things in action of the said judgment debtor [*If the receiver is appointed for a special purpose, it should here be specified thus; commencing at *, continue:*—to collect and receive the following property [*here specify the same*] belonging to the defendant, C. D., and under his control [*or, in the hands of the said E. F.*], and to apply the same, or the proceeds thereof, under direction of the court,

¹ Sheriff, clerk, or receiver. Or it may be ordered paid directly to the plaintiff, and applied to the judgment.

toward the satisfaction of the aforesaid judgment and costs, and to hold the remainder, if any, subject to the further order of the court]; that before entering upon his duties such receiver execute to the State of Ohio¹ an undertaking in the sum of — dollars, conditioned according to law, with good and sufficient security.

It is further ordered that the said judgment debtor [*or*, the said E. F.] deliver to the said receiver all moneys and other property now in his possession, or under his control, belonging to him [*or*, to the said C. D.], and not exempt from execution.²

And the said C. D. is hereby restrained from transferring or disposing of his property, or in any manner interfering therewith, until further order in the premises.

316. (Sec. 5486.) *Order for receiver to sell, etc.*

[*Title.*]

And now, the said C. D. having been examined before me, and it appearing, upon such examination, that he has some [*or*, an equitable] interest in certain real estate in this county, to wit [as mortgagor of], the following described real estate [*describe*], it is therefore, on motion of the plaintiff, ordered that the receiver heretofore appointed in this action proceed, as in case of sale of real estate on execution, to sell the said real estate [*or*, equitable interest of the said C. D.] and return his proceedings without unnecessary delay.

The proceedings of sale must be approved by the court in which the judgment was rendered,³ as in cases of sale upon execution. Modify decree of confirmation, decree No. 225, accordingly.

317. *Order for receiver to pay off a judgment.*

[*Title.*]

It appearing that the defendant, C. D., is indebted to the plaintiff on the judgment herein, in the sum of — dollars, with interest from the — day of —, 18—, and that R. S., the receiver appointed in supplementary proceedings herein, has in his hands money sufficient to satisfy the same, it is hereby ordered that the said receiver pay, first the costs of

¹ Code, sec. 5485.

² See page 171 and notes.

³ Code, sec. 5486.

this case [*or, of these proceedings*], including as a fee to himself, as such receiver, the sum of — dollars, which is hereby allowed to him as a reasonable amount for his services herein, taxed at \$—; and secondly, to the plaintiff or his attorney, G. H., upon his receipt being given therefor.* the full amount of his said judgment.

And it is ordered that said defendant file all of said receipts with the clerk of the court wherein his bond is filed, and that said judgment be entered satisfied on the record.

318. *Order for receiver to apply funds.*

[*Title.*]

*As in last to *, and continue:*—the balance of the funds remaining in his hands to be applied as a credit on the said judgment.

MINUTES OF THE JUDGE—

The report of the judge, to be filed with the clerk of the court, may begin as follows:

The State of Ohio, } ss.
County of —, }

Proceedings in aid of execution had before me, one of the judges of the court of — of —, in the case of A. B. against C. D., numbered —, in the [said] court of — of —, Ohio.

On the — day of —, 18—, came the said A. B., and made application [*state nature*]; and thereupon the following order was made, to wit: [*Copy the order, and so continue with all the proceedings.*]

Close as follows:

I do hereby certify that the above is a true record of the proceedings and orders had before me in the case therein set forth.

M. T.. *Judge of the Court of — of —.*

SUBDIVISION IV.—BY ATTACHMENT.

For proceedings to enforce a judgment by attachment, see CONTEMPTS OF COURT, *post*, p. 206.

DIVISION VI.—PROVISIONAL REMEDIES.

CHAPTER I. ARREST AND BAIL.

II. ATTACHMENT.

IV. INJUNCTION.

V. RECEIVERSHIP AND OTHER PROVISIONAL REMEDIES.

CHAPTER I.

ARREST AND BAIL.

MONEY DEPOSITED IN LIEU OF BAIL.—

319. (Sec. 5501.) Order for safe-keeping of.

320. (Sec. 5515.) Order refunding.

PROCEEDINGS AGAINST BAIL.—

321. (Sec. 5516.) Order staying.

MISCELLANEOUS—

322. (Sec. 5517.) Order of arrest vacated.

323. (Sec. 5517.) Amount of bail reduced.

324. (Sec. 5456.) Order for discharge of prisoner.

MONEY DEPOSITED IN LIEU OF BAIL.—

319. (Sec. 5501.) *Order for safe-keeping of.*

[*Title.*]

The sheriff of this county having brought here certain money, to wit, the sum of ——— dollars, received by him from the defendant herein in lieu of bail, it is ordered that said sheriff keep said money in his possession until further order of this court.

Other orders of court may be made for the safe keeping of bail money, and after final judgment an order will be made directing it to be paid to the party entitled to it.

320. (Sec. 5515 ; 77 O. L. 46.) *Order refunding.*

[*Title.*]

On motion, and it being shown to the court that the defendant herein has given an undertaking in bail in this action according to law, it is hereby ordered that the money heretofore deposited by the said defendant in lieu of bail, to wit, the sum of \$——, be refunded to the said C. D.

PROCEEDINGS AGAINST BAIL—

321. (Sec. 5516.) *Order staying.*

[*Title.*]

On motion of the defendant, and it appearing that proceedings in error have been commenced on the judgment against C. M., in case No. —— of this court, in which the undertaking here sued on was given, it is ordered that all proceedings in this case be stayed for —— days, or until further order of this court, on payment by the defendant of all costs heretofore accrued against him.

If, on such proceedings, the judgment against the principal is reversed, the suit against the bail must be dismissed, or judgment be set aside. An order should also be made in the original case, discharging the bail from his undertaking.

MISCELLANEOUS—

322. (Sec. 5517.) *Order of arrest vacated.*

[*Title.*]

On motion of the defendant, and it appearing to the court that reasonable notice of this motion has been given to the plaintiff, and for good cause shown,* the order for the arrest of the defendant, C. D., is hereby vacated, and the said defendant is discharged from the arrest made under said order.

323. (Sec. 5517.) *Amount of bail reduced.*

[*Title.*]

*As in last to *, and continue:]*—it is ordered that the bail taken [*or, to be taken*] by the sheriff for the discharge of the said C. D. from arrest in this action be, and hereby is, reduced to \$——.

324. (Sec. 5456.) *Order for discharge of prisoner.*

[*Title.*]

See Entry No. 300.

CHAPTER II.

ATTACHMENT.

SUBDIVISION III. EXECUTION AND RETURN THEREOF.

IV. DISPOSITION OF ATTACHED PROPERTY.

V. PROCEEDINGS UPON ATTACHMENT.

VI. GENERAL PROVISIONS.

SUBDIVISION III.—EXECUTION AND RETURN THEREOF.

EXAMINATION OF GARNISHEE—

325. (Sec. 5532.) *Order for special examination.*

EXAMINATION OF GARNISHEE—

The method of obtaining the ordinary examination of a garnishee is pointed out by the code, and no order of court is required.

Where a special examination of a garnishee is ordered, it is competent for the court to appoint a commissioner to take the same; it is not necessary that such examination should be had in open court.¹

325. (Sec. 5532.) *Order for special examination.*

[*Title.*]

It appearing that J. H. has been duly served with notice as garnishee in this case, but that by reason of illness he is unable to appear in court, on motion of the ——, the court

¹ Whitman v. Keith, 18 Ohio St. 134.

hereby appoints S. C. a special master commissioner to take and certify the examination of the said garnishee at his residence; and it is ordered that due notice of the time and place thereof be given to the adverse party.

And it is ordered that the said master commissioner make due return of his proceedings to this court.

SUBDIVISION IV.—DISPOSITION OF ATTACHED PROPERTY.

326. (Sec. 5539.) Appointment of receiver.

327. (Sec. 5544.) Order for sale of perishable property.

326. (Sec. 5539.) *Appointment of receiver to take possession of, etc.*¹

[*Title.*]

On motion of the —, and for good cause shown, it is ordered that E. F. be, and he hereby is, appointed receiver in this cause, to take possession of all notes, due-bills, books of account, accounts, and all other evidences of debt that have been taken by the sheriff, on an order of attachment issued in this action against the said C. D., defendant, and to do all other acts authorized by law necessary in the case. And it is ordered that the undertaking of the said E. F. be given in the sum of \$—, with security to the approval of the clerk.

And now came the said E. F., and was duly sworn as such receiver.

327. (Sec. 5544.) *Order for sale of perishable property.*

[*Title.*]

It appearing to the court that the property attached in this cause is perishable, and that [*or, It appearing to the court that, owing to the cost of keeping the property attached in this cause*] its sale would be to the benefit of all parties, on motion of the said plaintiff, it is ordered that the sheriff [*or, receiver herein*] proceed to sell the said property as upon execution; and that a credit, with good security, of — months be allowed to the purchasers thereof.

¹ For orders in case of receivers in general, see *post*, RECEIVER.

SUBDIVISION V.—PROCEEDINGS UPON ATTACHMENT.

COUNTER SECURITY.

GARNISHEE—

- 328. (Sec. 5550.) Garnishee ordered to deliver property into court.
- 329. (Sec. 5550.) Ordered to pay money into court.
- 330. Order complied with—garnishee discharged.
- 331. (Sec. 5550.) Order permitting garnishee to retain property or money.

ACTION AGAINST GARNISHEE—

- 333. (Sec. 5551.) Judgment in the action against garnishee, for failure to pay over, etc.
- 334. (Secs. 5551, 5552.) Same, upon failure to answer, or when answer is not satisfactory.

DISPOSITION OF ATTACHED PROPERTY—

- 335. (Sec. 5553-4.) When judgment is rendered for defendant.
- 336. Order applying money, after judgment for plaintiff.
- 337. (Sec. 5553.) When judgment is rendered for plaintiff—order that garnishee pay money to him.
- 338. (Sec. 5555.) When judgment is rendered for plaintiff—order for sale of attached property.
- 339. Order for receiver to collect, etc.
- 340. (Sec. 5557.) Order for sheriff to repossess himself, etc.
- 341. (Sec. 5559.) Order to refer question of priorities.

COUNTER SECURITY [Sec. 5545]—

See under ATTACHMENT DISCHARGED, page 186.

GARNISHEE—

If the garnishee do not appear in court and answer, the court may proceed against him, to compel the same, as for a contempt;¹ in which case the usual forms for proceedings in contempt may be used.² Or the plaintiff may proceed against such garnishee by a civil action.³

If it appears that the garnishee has in his hands property of, or money owing to, the defendant, the court may order the delivery of the property and the payment of the money into the court,⁴ either before or after judgment. It may be ordered delivered or paid to any officer of the

¹ Code, sec. 5549.

² See CONTEMPTS OF COURT.

³ Code, sec. 5551.

⁴ Code, sec. 5550.

court—sheriff, clerk, or receiver. If this order is not complied with, the plaintiff may then bring an action against the garnishee.¹

Section 5533 seems to contemplate, if not directly to authorize, an order by the court for the payment of any money, due, from the garnishee, directly to the plaintiff; as it provides that execution may issue against the garnishee if he fails to pay such money to the plaintiff on the order of the court. The court will not, however, make such order until after judgment for the plaintiff.²

328. (Sec. 5550.) *Garnishee ordered to deliver property into court.*

[*Title.*]

It appearing from the answer of E. F., garnishee herein, that he has in his possession certain property of the said C. D., on motion of the plaintiff it is ordered* that the same be delivered to the sheriff of this county [*or, to G. H., the receiver herein*] within — days from the date of this entry. And that said garnishee be thereupon discharged.

329. (Sec. 5550.) *Ordered to pay money into court.*

[*Title.*]

It appearing from the answer of E. F., garnishee herein, that he is indebted to the said C. D. in the sum of \$—, on motion of the plaintiff it is ordered* that he pay said sum to the clerk of this court [*or, to G. H., the receiver herein*] within — days from the date of this order. And that said garnishee be thereupon discharged.

330. *Order complied with, garnishee discharged.*

[*Title.*]

Now comes E. F., the garnishee herein, and delivers into court the property [*or, pays into court the money, to wit, the sum of \$—*] admitted by him to be in his hands belonging [*or, to be owing*] to the said C. D., and subject to the order of the court. And thereupon the said garnishee is discharged from any further liability herein.

¹ Code, sec. 5551.

² See Entry No. 337.

331. (Sec. 5550.) *Order permitting garnishee to retain property or money.*

[*Title.*]

As in No. 328 or 329 to ❖, and continue:]—that the said E. F. be permitted to retain the said goods and chattels [*or, money*] in his hands, subject to the orders of this court, upon his giving to the plaintiff an undertaking conditioned according to law in the sum of \$——, with sureties to the approval of the court.

And thereupon came the said E. F., and gave his undertaking accordingly, with L. M. and S. T. as sureties, to the approval of the court.

ACTION AGAINST GARNISHEE—

Final judgment in this action can not be rendered until the action against the defendant in attachment has been determined.¹ If judgment is rendered for defendant in attachment, this suit must be dismissed and the garnishee will recover costs.¹ If judgment be for the plaintiff in attachment, judgment in this suit may be rendered against the garnishee.

333. (Sec. 5551.) *Judgment in the action against garnishee, for failing to pay over, etc.*

[*Title.*]

If this judgment is after trial, use Finding III., page 99; if on defendant's default, use Finding IV., page 100, and continue:]—and that the defendant has failed to comply with the order of the court made in said case No. —, directing him as garnishee to pay certain moneys into court, and that he has in his possession as such garnishee, and is liable for, the sum of \$——. And it further appearing ❖ that this plaintiff has obtained a judgment against the said M. N. in said case No. — of this court for the sum of \$——, with interest and costs, which remain due and unsatisfied:

It is therefore considered by the court that the said plaintiff recover from this defendant the said sum of — dollars, so found to be in his possession, together with his costs herein

¹ Code, sec. 5553.

expended;† and that said sum be credited on the judgment aforesaid against the said M. N.

Or, if more money is found in the hands of the garnishee than is sufficient to pay the claim of the plaintiff against the defendant in attachment, instead of the last sentence of the judgment, beginning at †, order as follows, by sec. 5552:

Order substituting defendant in attachment.

†And it appearing that after the claim of the plaintiff herein against the said N. M. is satisfied there will still remain of the money, in the hands of this defendant as such garnishee, the sum of \$—— belonging to the said M. N., it is therefore ordered, on motion of the said M. N., that, as to said balance, the said M. N. be substituted for the plaintiff in the judgment in this action; and that he have execution against this defendant for the said balance of —— dollars.

334. (Sees. 5551 and 5552.) *Same, upon failure to answer, or when answer is not satisfactory.*

[*Title.*]

If this judgment is after trial, use Finding III., page 99; if on defendant's default, use Finding IV., page 100, and continue:]—and that the defendant has not complied with the order of the court made in case No. —— directing him to appear and answer therein as such garnishee [*or, that the defendant's answer as garnishee in case No. —— of this court and his disclosure are not satisfactory*]; and the court further find upon all the evidence that this defendant had in his hands at the time of the service of the order of attachment and notice upon him, certain moneys as garnishee belonging to the said defendant in attachment, for which he is liable to this plaintiff, to wit, the sum of \$——. And it further appearing, etc. *conclude as from ✽, in last entry.*

DISPOSITION OF ATTACHED PROPERTY.

335. (Sec. 5553—4.) *When judgment is rendered for defendant.*

[*Title.*]

Add to judgment entry the following:]

It is further ordered that the attachment in this case be

discharged, and that the garnishee recover from the plaintiff his costs herein expended, also that the attached property [*or*, the proceeds of the attached property] in the hands of the sheriff be returned to the said defendant.

336. *Order applying money, after judgment for plaintiff.*

[*Title.*]

It appearing that the garnishee herein has paid into court [*or*, has in his hands] certain money, belonging [*or*, owing] to the said C. D., to wit, the sum of \$——, it is now, on motion, ordered that the same be applied, on the judgment herein, first to the payment of the costs; and that the balance be paid to the plaintiff, or his attorney, L. H., as a credit on his judgment. And the clerk [*or*, the garnishee] is directed to pay over said money in accordance herewith.

337. (Sec. 5553.) *When judgment is rendered for plaintiff—order that garnishee pay money to him.*

[*Title.*]

Add to judgment, or make separate entry, as follows:]—And it appearing from the answer of E. F., garnishee herein, that he is indebted to the said C. D. in the sum of —— dollars, on motion of plaintiff, it is ordered that the said E. F. pay said sum to the plaintiff, A. B.¹; and that the same be applied as a credit upon his judgment against this defendant. And in default of such payment execution is awarded therefor.

338. (Sec. 5555.) *When judgment is rendered for plaintiff—order for sale of attached property.*

[*Title.*]

Add to the judgment entry the following order:]

And, on motion of the said plaintiff, it is ordered that the sheriff proceed, as upon execution, to advertise and sell the personal property [*or*, real estate] heretofore attached in this action, and now in his hands remaining, or so much thereof as will satisfy the judgment and costs aforesaid.

¹ See sec. 5533, and page 180, *ante*.

*In case of sale of real estate add:—*and that he report his proceedings to this court for confirmation.

The subsequent decree of confirmation is similar to that in case of other judicial sales. See Decree No. 225.

For proceedings in contempt, to compel the delivery to the sheriff, for sale, of the attached property, under section 5556, see entries under CONTEMPTS OF COURT.

If mere evidences of indebtedness, such as notes, due-bills, or accounts, have been attached, they will not be sold, but the proper remedy is for a receiver, or the sheriff acting as such, to settle and collect the debts. Notice is to be given to the debtors, and the debts collected by action.¹ If a receiver has already been appointed, he may be ordered to collect. If none has been appointed, the following order may be made :

339. *Order for a receiver to collect, etc.*

[*Title.*]

It appearing to the court that part of the property attached in this action, and now held by the sheriff, consists of notes, due-bills, and accounts due the defendant herein from sundry individuals, it is ordered that A. R. be, and he hereby is, appointed receiver to take charge of all such evidences of indebtedness: and said receiver is hereby authorized and directed to bring actions against the persons so indebted to the defendant, and to collect and hold, subject to the further order of this court, the amounts due. And it is ordered that the said A. R. before entering upon his duties as aforesaid, give an undertaking in the sum of — dollars, with security to the approval of the clerk.

Or, the order may be that the sheriff acting as receiver shall make the collections.

340. (Sec. 5557.) *Order for sheriff to repossess himself, etc.*

[*Title.*]

It appearing to the court that certain of the goods and chattels attached by the sheriff in this case, to wit [*here state*

¹ Finnell v. Burt, 2 Handy, 203.

property], have passed out of his hands without having been sold or converted into money :

Now, on motion of the said plaintiff, it is ordered that the said sheriff repossess himself of said property, as under an order of attachment.

341. (Sec. 5559.) *Order to refer question of priorities.*

[*Title.*]

It appearing to the court that several attachments have been executed on the property attached in this case [*or*, that the garnishees herein have been garnisheed in other cases], on motion¹ of the plaintiff herein, by his attorney, it is ordered that the matter be, and it hereby is, referred to E. F., to ascertain and report to the court, without unnecessary delay, the amounts and priorities of the several attachments.

The report of the referee should be confirmed by the court. See Entry No. 151.

SUBDIVISION VI.—GENERAL PROVISIONS.

ADDITIONAL SECURITY—

342. (Sec. 5561.) *Order for.*

ATTACHMENT DISCHARGED—

343. (Sec. 5545.) By counter security—order approving bond.

344. (Sec. 5562.) Order discharging, on motion.

ADDITIONAL SECURITY—

342. (Sec. 5561.) *Order for.*

[*Title.*]

On motion of the defendant, and due notice given, and it appearing that the surety in the plaintiff's undertaking in attachment herein has removed from the state [*or*, is not sufficient for the amount thereof], it is ordered that unless, within —— days from this time, good and sufficient security

¹ It is error to make a subsequent attaching creditor a party to the action of a prior attaching creditor, on the ground of his interest acquired by the levy. His remedy is by motion. *Ward v. Howard*, 12 Ohio St. 158; *Harrison v. King*, 9 Ohio St. 388.

be given by the plaintiff, that then the said attachment stand vacated and discharged, and that the sheriff then return to the defendant any property taken under the said attachment.

ATTACHMENT DISCHARGED—

Two methods are provided by the code for discharging an attachment before judgment. Counter security, to be approved by the court,¹ or, in vacation, by the clerk or sheriff,² may be given by the defendant to the plaintiff, which security will be taken as an equivalent for the property;³ the discharge and restitution and discharge of the garnishee following as of course.

Or the discharge may be by order of court, on the motion of the defendant.⁴ The execution of the undertaking does not estop the defendant from moving to discharge the attachment.⁵

There are cases where, on motion by defendant, an attachment will be discharged as to a part of the property attached.⁵

343. (Sec. 5545.) *Counter security—order approving bond.*

[*Title.*]

Now came the defendant, by his attorney, and presented to the court his undertaking for the discharge of the attachment issued herein, with E. F. and G. H. as sureties, to the approval of the court, in the sum of \$——.

And the said attachment is accordingly discharged, and restitution ordered of the property taken under it by the said sheriff.

If the undertaking is for the release of a garnishee, also add :]
—and the said garnishee is discharged from all liability in this action.

344. (Sec. 5562.) *Order discharging, on motion.*

[*Title.*]

On motion of the defendant, and due consideration thereof had, it is ordered that the attachment in this action be, and

¹ Code, sec. 5545.

² Code, sec. 5546.

³ Egan v. Lumsden, 2 Disney, 168.

⁴ Code, sec. 5562.

⁵ Northern Bank of Kentucky v. Nash, 1 Handy, 153.

the same hereby is, discharged, and the sheriff ordered to restore to the defendant the property taken under said attachment.

If there is a garnishee, add or substitute :]—and the garnishee is released from all liability in this action.

CHAPTER III.

ATTACHMENT BEFORE DEBT DUE.

345. (Sec. 5565.) Order allowing attachment.

In an action before the debt is due, an order of attachment can only be issued by order of court, or of a judge thereof.¹

It is proper practice to dismiss the action, where an attachment obtained on a debt not due is discharged ;² but it is matter of discretion with the court whether the action shall be dismissed or allowed to proceed, after the debt becomes due. It is proper to dismiss it, unless special reasons to the contrary are shown.³

345. (Sec. 5565.) Order allowing attachment.

[*Title.*]

On application of the plaintiff herein, and proper showing being made, an order of attachment is allowed to issue in this case, in the sum of \$——,⁴ on plaintiff giving an undertaking, as provided by law, in the sum of \$——.⁵

¹ Code, sec. 5565.

² Heidenheimer v. Ogborn, 1 Disney, 351.

³ Ramsey v. Overaker, 1 Disney, 569.

⁴ Not exceeding a sum sufficient to satisfy the plaintiff's claim and the probable costs of the action. Sec. 5567.

⁵ Not exceeding double the amount of the plaintiff's claim. Sec. 5568.

CHAPTER IV.

INJUNCTION.

RESTRAINING ORDER—

346. (Secs. 5574, 5575.) Restraining order allowed.

INJUNCTION AS A PROVISIONAL REMEDY—

347. (Sec. 5573.) Order allowing.

348. (Sec. 5581.) Fine for disobedience imposed, etc.

SECURITY—

349. (Sec. 5582.) Order for additional security.

350. (Sec. 5584.) Order vacating injunction.

351. (Sec. 5584.) Order modifying.

INJUNCTION AS A FINAL JUDGMENT—

352. Temporary injunction made perpetual.

353. Decree for injunction.

The injunction provided for in the code is either a final judgment in an action, or is allowed as a provisional remedy,¹ during the pendency of the suit. In the latter case it is an order.¹ The code also provides for a temporary restraining order.²

RESTRAINING ORDER—

A restraining order may be granted *ex parte*.³ A bond is usually required, as in case of a provisional injunction. Its continuance will be limited by the order creating it; generally to a time fixed for the hearing of the application for a provisional injunction, and until further order of court. No appeal lies for dissolving a restraining order. It may be granted by the court or by a judge, and may be enforced in the same manner as an injunction.⁴ When it is applied for, on filing of the petition and allowed, *ex parte* the judge often indorses the allowance on the back as follows:

“A restraining order is allowed to issue as prayed for herein until [*name date; or say, until further order of court*] on plaint-

¹ Code, sec. 5571.

² Secs. 5572, 5574, 5575, 5581.

³ Code, secs. 5574, 5575.

⁴ Sec. 5581.

iff giving an undertaking, conditioned according to law, in the sum of —— dollars.”

This order should also be put upon the minutes of the court. At other times the entry will be as follows ;

346. (Secs. 5574 and 5575.) *Restraining order allowed.*

[*Title.*]

On application of the plaintiff herein for an injunction in this case, it is ordered that said application be set down for hearing on the —— inst., at 10 o'clock A. M., in room No. 1 of the Common Pleas Court, and in the meantime, and until further order of court, a restraining order is allowed as prayed for in the petition [*or, restraining the defendant, C. D., from (state acts)*], upon plaintiff giving an undertaking according to law in the sum of \$——.

INJUNCTION AS A PROVISIONAL REMEDY—

An injunction can not be granted after answer without notice.¹ And in any event the court may require notice to be given before allowing it.² But if no answer has been filed, the court may, in their discretion, grant it *ex parte*. An order dissolving it may be appealed from.³

Disobedience of an injunction may be punished as a contempt, by the court, or by any judge who might have granted it in vacation.⁴ See PROCEEDINGS IN CONTEMPT.

When a temporary injunction has been allowed, and the complaint in the action is subsequently dismissed, the injunction *ipso facto* falls with it.⁵

347. (Sec. 5573; 85 O. L. 151.) *Order allowing injunction.*

[*Title.*]

On motion of the plaintiff, by his attorney, and good cause being shown therefor, it is ordered that, on an undertaking being given in the sum of \$——, with sureties to the approval of the clerk, an injunction be allowed to issue herein, enjoining the said defendant from [*state acts enjoined*], until the further order of this court.

¹Code, sec. 5575

²Code, sec. 5574.

³Sec. 5226, 82 O. L. 32

⁴Code, sec. 5581.

⁵Hoyt v. Carter, 7 Howard, 140.

348. (Sec. 5581.) *Fine for disobedience imposed, and order of restitution.*

[*Title.*]

Now came the said C. D. in obedience to the rule of the court [*or, in custody of the sheriff; or, in accordance with his undertaking of bail to the sheriff*], and was examined under oath touching his alleged disobedience of the injunction of the court herein; and on consideration thereof the court find him guilty of the same, and that he is thereby guilty of a contempt.

It is therefore adjudged that the said C. D. pay a fine of — dollars and the costs of this proceeding, and execution is awarded therefor.

And it is further ordered that the said C. D. make immediate restitution to the said A. B. by [*state how*], and that he enter into a further undertaking in the sum of \$— to the said A. B., with good security to the acceptance of the clerk of this court, that he will obey said injunction as heretofore allowed.

And in default of performing any of the above requirements, it is ordered that the said C. D. stand committed to the sheriff of — county, to be kept in close custody until he shall fully comply with the said order, or be otherwise legally discharged.

SECURITY—

If it appear that the surety in the undertaking has removed from the state, or is not sufficient, additional security may be ordered.

The court, in continuing an injunction, may require *additional* or *new* security to be given, or a bond with new and enlarged conditions; and so the court may order the new bond to be given in the place of, and as a substitute for the former bond, which may be thereby discharged without the consent of the obligee. But if such order be not substantially complied with, as where, by mistake of the clerk, the new bond is conditioned merely for the payment of the costs, the former bond is not discharged.¹

¹ Kent v. Bierce, 6 Ohio, 336.

349. (Sec. 5584.) *Order for additional security.*

[*Title.*]

On motion, and it appearing to the court that the security heretofore given on the injunction allowed herein is insufficient [*or*, that the surety in the undertaking has left the state], it is ordered that an additional undertaking in the sum of — dollars, to the approval of the clerk of this court, be given within — days: and in default thereof, that the injunction stand vacated and dissolved.

350. (Sec. 5584.) *Order vacating injunction.*¹

[*Title.*]

This cause being heard on the motion to vacate the provisional injunction herein, the court, on consideration, grant the same, and the said injunction is hereby vacated and dissolved.

351. (Sec. 5584.) *Order modifying.*

[*Title.*]

This cause being heard on the motion to vacate the provisional injunction herein, the court, on consideration, order that the said injunction be modified, and is hereby so changed as to allow, etc. [*specify.*]

INJUNCTION AS A FINAL JUDGMENT—

A temporary injunction may be made perpetual, or the injunction, as a final judgment, may be made as an independent decree. If in either case an appeal is taken and judgment suspended, see entry 157a.

352. *Temporary injunction made perpetual.*

[*Title.*]

Now came the parties herein, by their attorneys, and thereupon this cause came on for hearing on the pleadings and evidence, and was submitted to the court; on consideration whereof, the court find, on the issue joined, for the plaintiff [*or*, that the allegations of the petition are true], and that the plaintiff is entitled to the relief prayed for. *

It is therefore, on motion of the plaintiff, adjudged and decreed that the injunction heretofore granted in this action be, and the same hereby is, made perpetual. It is further

¹If an appeal is taken from this order see pages 76a and 77.

considered that the said plaintiff recover from the said defendant his costs herein expended, taxed at \$——.

353. *Decree for injunction.*

[*Title.*]

*As in last to *, and continue:*—It is therefore considered and decreed that the defendant, C. D., be, and he hereby is, perpetually enjoined from [*here state special acts*]. It is further considered that the plaintiff recover from the said defendant his costs herein expended, taxed at \$——.

CHAPTER V.

RECEIVERSHIP, AND OTHER PROVISIONAL REMEDIES.

RECEIVER—

- 354. (Sec. 5587.) Order appointing.
- 355. (Sec. 5590.) Order for receiver to bring suit.
- 356. Order allowing action against.
- 357. (Sec. 5591.) Ordered to invest money.
- 358. Order confirming report, and discharging receiver.

GOODS IN CUSTODY OF RECEIVER—

- 359. Order for sheriff to withdraw levy.
- 360. Order permitting levy.

PROPERTY HELD BY PARTY AS TRUSTEE—

- 361. (Sec. 5592.) Order for deposit of.
- 362. (Sec. 5593.) Order for delivery of, enforced.

RECEIVER—

When the motion for a receiver has been made by counsel, and allowed, care should be taken in drawing the order for his appointment, that it contain and explain fully his powers.¹ The order should also state distinctly over what property the receiver is appointed, that a party may know what it is that the officer of the court is in possession of.²

¹ See Edwards on Receivers, 79.

² *Crow v. Wood*, 13 Bevan, 271.

If the appointment of a receiver is over real or leasehold estate, the order usually directs the parties to the record who are in possession, not as tenants, but as owners, to deliver up to him the possession.¹

It is also well enough to order *all* persons having control of property or rents to pay, belonging to the receiver, to pay the same over to him on demand, as this is the readiest means of conveying the order of the court to the understanding of the person having such control.

A receiver is an officer of the court, and his possession is that of the court,² and can not be interfered with without leave of the court. A suit against a receiver can be brought by leave of the court appointing him.³ Notice of the application should be given to the receiver, but it is not essential that it be given to the parties to the action in which he was appointed.⁴

354. (Sec. 5587, 82 O. L. 35.) *Order appointing receiver.*

[*Title.*]

And now this cause came on to be heard upon the motion of the — for the appointment of a receiver herein. And thereupon the court find that the partnership existing between the parties to this action is one dissolvable at will, and that the — is neglecting the business of the firm, whereby there is danger of the property of the said firm being lost; [*or state any other facts, as the case requires*].

It is therefore ordered that E. F. be, and he is hereby, appointed receiver of all the debts, property, equitable interests and things in action belonging to said firm: that said receiver, upon being duly qualified, proceed to collect the debts of the firm, etc. [*state any special order to the receiver, as called for by section 5590, or otherwise*]. And the said parties here, and all other persons having any of said property in their possession or under their control, are hereby ordered to deliver the same, and all persons owing any such money belonging to said firm are hereby directed to pay over the same, to the said E. F., as such receiver, on his demand.

¹ Griffith v. Griffith, 2 Ves. 401.

² Spinning v. Ohio Life Ins. Co., 2 Disney, 336.

³ Murphy v. Holbrook, 20 Ohio St. 137.

⁴ Potter v. Bunnell, 20 Ohio St. 150.

And it is ordered that, before entering upon his duties, such receiver execute to the plaintiff herein [*or such person as the court may direct*] an undertaking, conditioned according to law, in the sum of \$——.

And now came the said E. F., and presented his undertaking, with J. K. and L. M. as sureties, to the approval of the court, and was duly sworn as such receiver.

355. (Sec. 5590.) *Order for receiver to bring suit.*

[*Title.*]

It appearing to the court that E. F., the receiver herein, claims that S. T. is rightly indebted to the —— in this case in the sum of \$—— [*or, that the receiver herein holds the promissory note of S. T., now past due, for the sum of \$——*], the court does now, upon the application of said receiver, authorize and direct him to bring an action against the said S. T. for the recovery of the said sum of \$——, with the interest thereon.

356. *Order allowing action against a receiver.*

[*Title.*]

Now comes R. S., and moves the court for leave to bring an action against the receiver heretofore appointed by this court in this cause; on consideration whereof, the court grant the same, and allow the said R. S. to file his petition forthwith.

357. (Sec. 5591.) *Order for receiver to invest money.*

[*Title.*]

On motion, and by consent of all the parties to this action, it is ordered that the receiver in this action invest the funds in his hands as such receiver in [*specify investment*], and hold the same subject to the orders of this court.

358. *Order confirming report, and discharging receiver.*

[*Title.*]

This cause coming on to be heard upon the motion to confirm the final report of, and to discharge the receiver herein, it is ordered, on motion of the said receiver, that he be al-

lowed and paid the sum of — dollars out of the money in his hands, in full for his services herein. And the court finding the said report correct, and that the said receiver has fully obeyed the orders of the court to him issued, and has duly paid over all moneys coming into his hands as such receiver:

It is therefore ordered that all acts and things done by him, as well as his said report, be, and they hereby are, approved and confirmed; and the said E. F. is discharged from his duties, liabilities, and responsibilities as such receiver, and his undertaking therefor is vacated and canceled.

GOODS IN CUSTODY OF A RECEIVER—

If a sheriff make a levy upon property in the custody of a receiver of the court, he may be ordered to withdraw his levy, and answer to the court for a contempt in making it.¹

But *it seems* the court may properly permit a levy, so as to enable the judgment creditor to secure any rights to the property which a levy would give, in the event the claims in the action, in which the receiver was appointed, should not be prosecuted, or should not be sustained.¹

359. *Order for sheriff to withdraw levy.*

[*Title.*]

It appearing that the sheriff of this county has made a levy upon certain property in the hands of the receiver in this action, without permission of the court, it is, on motion, ordered that he withdraw the same forthwith.

It is further ordered that the said sheriff appear before this court, on the — day of —, and show cause why an attachment should not issue against him as for a contempt of court in making said levy.

For further proceedings in contempt, see CONTEMPT OF COURT.

360. *Order permitting levy.*

[*Title.*]

On motion of the plaintiff, by his attorney, he is hereby al-

¹ *Coe v. C., P. & I. R. R. Co.*, 10 Ohio St. 403.

lowed to levy an execution, on the judgment in this case, on the property of defendant, now in the hands of E. F., receiver of this court, for the purpose of obtaining a lien thereon.

PROPERTY HELD BY PARTY AS TRUSTEE—

361. (Sec. 5592.) *Order for deposit of.*

[*Title.*]

It appearing from the answer [*or, examination*] of J. H. that he has in his possession [*or, under his control*] certain money, to wit, the sum of — dollars, belonging to E. F., which is the subject of this litigation, and which the said J. H. holds as trustee of the said E. F., it is now, on motion of —, ordered that the same be deposited with the clerk of this court, subject to the further order of court. [*Or, delivered to the said E. F., upon his giving security to the approval of the court that the said money shall be forthcoming, subject to the further orders of court.*]

362. (Sec. 5593.) *Order for delivery of, enforced.*

[*Title.*]

It appearing to the court that S. P. has property in his possession, which, under the former order of this court, he was required to deliver to the said receiver [*or to any other person*] in this action; and it further appearing that the said S. P. has, on demand, refused to make such delivery:

It is therefore ordered that the sheriff of this county do forthwith proceed to take the said property and deliver [*or, deposit the same in conformity with the former order of this court.*]

And it is further ordered that an attachment be issued, commanding the sheriff to arrest and bring the said S. P. before this court, on the — day of —, to answer for this, his neglect and refusal, as for a contempt of court.

For further proceedings in attachment, see CONTEMPTS OF COURT.

DIVISION VII.—SPECIAL PROCEEDINGS.

CHAPTER I. AMERCEMENT.

- II. ARBITRATION.
- III. BASTARDY.
- IV. CONTEMPTS OF COURT.
- V. DISSOLUTION OF CORPORATIONS.
- VI. DIVORCE AND ALIMONY.
- VII. DOWER.
- VIII. HABEAS CORPUS.
- IX. PARTITION.
- X. REAL ACTIONS.
- XI. REPLEVIN.
- XII. SURETIES—RIGHTS AND REMEDIES OF.
- XIII. TAXES AND ASSESSMENTS—RELIEF AGAINST ILL GA.
- XIV. TO CHANGE NAME.
- XV. TO CONTEST WILL.
- XVI. TO CURE CERTAIN DEFECTS, ERRORS, AND OMISSIONS.
- XVII. TO PERPETUATE TESTIMONY.
- XVIII. WATERCRAFT.
- XIX. WRECKMASTERS.

CHAPTER I.

AMERCEMENT.

- 363. (Sec. 5594.) For failing to execute a writ of execution, etc.
- 364. (Sec. 5594.) For failing to pay over money.
- 365. (Sec. 5596.) For failing to execute order or process.
- 366. (Sec. 5597.) Amercement of clerk.
- 367. (Sec. 5599.) Judgment making surety a party to a judgment, etc.
- 368. (Sec. 5600.) Officer amerced allowed to sue out execution.

It seems that in a proceeding of amercement no pleadings after the notice are required.¹ It is on motion, and not on pleadings.² But the

¹ Wadsworth v. Parsons, 6 Ohio, 449.

² Armstrong v. Grant, 6 Kan. 285.

facts which warrant the judgment of the court must be set out in the motion and appear upon the record.¹

The amount for which a sheriff is to be amerced for neglecting to serve final process is ascertained by adding to the amount of the judgment debt interest which has accrued thereon and the costs; and then add ten per centum upon the whole amount so made up of the judgment debt, interest, and costs, which makes up the true amount of the judgment to be rendered on the amercement; and this judgment of amercement draws interest like other judgments.¹

363. (Sec. 5594.) *Amercement of officer for failing to execute a writ of execution, etc.*

[*Title.*]

And now this cause came on for hearing on the motion of the plaintiff for the amercement of the sheriff [*or, other officer*] of this county: and due legal notice of said motion having been given to him, the court, on consideration of the premises, find that the said sheriff [*or, other officer*], M. N., has refused [*or, neglected*]* to execute the writ of execution on the judgment rendered in this action, on the — day of —, for \$— damages and costs, which said execution was issued in due form, and delivered to him, the said sheriff, on the — day of — [*or, state any other facts coming within the statute*], and that he is liable to amercement therefor in the sum of \$—, being the amount of said damages and costs, with a penalty of ten per cent thereon.

It is therefore ordered that the said M. N., sheriff, be amerced for this said refusal [*or, neglect*] in the said sum of — dollars: and that the said plaintiff recover the same, together with his costs herein expended, from the said M. N., according to the force and effect of the statute in such case made and provided.

364. (Sec. 5594.) *Amercement for failure to pay over money.*

[*Title.*]

*As in last to **, and continue:—to pay over to this plaintiff certain moneys received by him in his official capacity, for

¹ *Graham v. Newton*, 12 O. 210.

the use of said plaintiff, to wit, the sum of \$——, which came into his hands [*state the circumstances*]; and that he is liable to amercement therefor:

It is therefore ordered that the said M. N., sheriff [*or, other officer*], be amerced for this said neglect [*or, refusal*] in the sum of —— dollars; and that the said plaintiff recover the same, together with his costs in this behalf expended, from the said M. N., according to the force and effect of the statute in such case made and provided.

Modify one of the two last entries to meet other cases provided for in section 5594.

365. (Sec. 5596.) *Amercement for failing to execute order or process.*

[*Title.*]

*As in No. 363 to *, and continue:*]—without sufficient cause to execute certain process in this case, to wit [*here state the process*], which, was on the —— day of ——, 18——, duly issued and delivered to him; and thereupon find that the said sheriff is liable to amercement therefor.

It is therefore ordered by the court that the said M. N., sheriff [*or, other officer*], be amerced for this his said refusal [*or, neglect*], in the sum of —— dollars; and that the said plaintiff recover the said sum, together with his costs herein expended, from the said M. N., according to the force and effect of the statute in such case made and provided.

366. (Sec. 5597.) *Amercement of clerk.*

[*Title.*]

See Entry No. 364.

367. (Sec. 5599.) *Judgment making the surety of an officer party to a judgment of amercement against the officer.*

[*Title.*]

If this judgment is rendered after trial, use Finding III., page 99; if on default, Finding IV., page 100, and continue:]—and that the defendants, E. F. and G. H., as sureties of the said

C. D., sheriff as aforesaid, are liable to the plaintiff herein upon the said judgment of amercement against the said C. D.

It is therefore considered that the said E. F. and G. H. be, and they hereby are, made parties to the judgment rendered as aforesaid against the said C. D.; and that the said A. B., upon the same judgment, have his execution against the said E. F. and G. H. for the damages and costs aforesaid, to wit, the sum of \$—— damages, with interest from ——, and \$—— costs, together with his costs in this behalf expended.

368. (Sec. 5600.) *Officer amerced allowed to sue out execution, etc.*

[*Title.*]

On motion of L. M., sheriff [*or, other officer*] of this court, heretofore amerced in this case, it is hereby ordered that he be permitted to sue out an execution on the judgment herein, and collect the same for his own use, in the name of the present plaintiff.

CHAPTER II.

ARBITRATION.

369. (Sec. 5609.) *Judgment on award for money.*

370. (Sec. 5610.) *Judgment to enforce the performance, etc.*

371. *Order allowing arbitration in a pending case.*

372. *Judgment on the award.*

Where a question of damages arises in a pending case, the court may, by the consent of both parties, permit the amount to be fixed by arbitration, and decree the amount thus found.¹

A court of chancery will not decree a specific performance of an agreement to arbitrate, nor require arbitrators to make an award 1.

369. (Sec. 5609.) *Judgment on award for money.*

[*Title.*]

Now came the said A. B., by his attorney, and having be-

¹Conner v. Drako, 1 Ohio St. 166.

fore this term of court filed an arbitration bond duly executed between himself and the said C. D., and also a copy of the award thereunder; and it appearing that all the conditions of the said bond have been complied with,¹ and a copy of the said award duly furnished to the said C. D., who neglects [*or, refuses*] to comply with the same: * and the sum of \$—— having been, by said arbitration, awarded to the said A. B., which sum is due and payable from the said C. D.:

It is therefore considered by the court that the said A. B. recover from the said C. D. the said sum of —— dollars so awarded to him, together with his costs in this behalf expended; and execution is awarded therefor.

370. (Sec. 5610.) *Judgment to enforce the performance of an act other than the payment of money.*

[*Title.*]

*As in last decree to *, and continue:—**and it having been, by said arbitration, awarded and determined that [*here state the act to be done*]:

It is therefore ordered and adjudged by the court that unless the said C. D. do, within —— days, perform and fulfill the said matters on his part to be done according to the said award, a rule be allowed to issue directing the said C. D. to appear before this court to show cause why an attachment as for a contempt should not issue against him for said disobedience.²

371. *Order allowing arbitration in a pending case.*

[*Title.*]

Now came the parties, by their attorneys, and, on motion, and by consent of all parties, it is ordered that the question of damages in this case be, and the same hereby is, referred to the award and determination of R. W. and J. H., who shall have their said award drawn up in writing, and signed by them, before the first day of the next term of this court;

¹ *Stram v. Cunningham*, 3 Ohio, 286.

² For the proceedings in contempt, see CONTEMPTS OF COURT.

and the parties agree that judgment shall be entered on such award at the next term of this court; and that no exceptions on account of form, substance, or otherwise, shall at any time be taken to such award, or judgment thereon.

372. *Judgment on the last award.* .

[*Title.*]

Now came the parties hereto, and the award of the arbitration heretofore ordered having been filed, the court find the same to have been made in all things in pursuance of the said order [*continue us from *. in Entry No. 369 or 370, according to circumstances.*]

CHAPTER III.

BASTARDY.

- 373. (Sec. 5617.) Discharge, on bond given.
- 374. (Sec. 5619.) Recognizance taken, defendant discharged.
- 375. (Sec. 5622.) Prisoner delivered and committed, recognizance released.
- 376. (Sec. 5622.) New recognizance ordered.
- 377. (Sec. 5623.) Recognizance forfeited.
- 378. (Sec. 5625.) Plea of “not guilty,” and order for jury trial.
- 379. (Sec. 5625.) Defendant failing to appear, order for trial.
- 380. (Sec. 5626.) Verdict of guilty.
- 380a. (Sec. 5626.) Judgment on verdict for maintenance.
- 381. (Sec. 5626.) Plea of guilty, and order for maintenance.
- 382. (Sec. 5628.) Suggestion of mother’s death, etc.
- 383. (Sec. 5630.) Judgment reduced on death of child.

373. (Sec. 5617.) *Discharge, on bond given.*

[*Title.*]

Now come the parties hereto, and the plaintiff having agreed to receive from the defendant the sum of — dollars, in full satisfaction of this action and her claims upon the said defendant, and the said defendant having paid the same [*or, secured the payment of the same to the satisfaction of the court*], and having also given bond to the State of Ohio, with E. F. and G. H. as sureties, to the approval of this court, conditioned to save the [*county, township, or municipal corporation*] from all charges for the maintenance of said

child; now, therefore, the said C. D. is hereby discharged from custody upon payment of the costs of this prosecution, and this action is dismissed.

374. (Sec. 5619.) *Recognizance taken, defendant discharged.*
[Title.]

Now comes the defendant, C. D., and with J. R. and R. S. as his sureties, to the approval of the court entered into recognizance in the sum of — dollars, conditioned for his appearance at the — term of this court, to answer the charge in this action; and the said C. D. is therefore discharged from custody.

375. (Sec. 5622.) *Prisoner delivered, and committed, recognizance released.*
[Title.]

Now come J. R. and R. S., the sureties on the recognizance of the said C. D., and surrender the body of the said C. D., and ask to be released from said recognizance; and the said C. D. being in charge of the sheriff, it is ordered that the aforesaid recognizance be canceled, and that the said C. D. be committed to jail until he shall give a new recognizance.

376. (Sec. 5622.) *New recognizance ordered.*
[Title.]

On motion, and it appearing to the court that the recognizance herein taken is insufficient, it is ordered that a new one be taken. And that in default of the said defendant entering into the same, he be committed to jail; and a capias is allowed therefor.

377. (Sec. 5623.) *Recognizance forfeited.*
See entry No. 913.

378. (Sec. 5625.) *Plea of "not guilty," and order for jury trial.*
[Title.]

And now the defendant coming into court, for plea to the charge made against him in this action, saith that he is "not

guilty,” and the court order the issue to be tried by a jury.

379. (Sec. 5625.) *Defendant failing to appear: order for trial.*
[Title.]

And now the defendant being called, and failing to appear as recognized to this court, it is ordered that the issue of his guiltiness be tried by a jury.

380. (Sec. 5626.) *Verdict of guilty.*
[Title.]

Follow the usual form of entering verdict, for which see pages 56 and 57, and let the verdict be:—

“We, the jury, find on the issue joined [*or, submitted to us*], that the defendant, C. D., is guilty as charged in this case.
(Signed,) A. B., *Foreman.*”

380a. (Sec. 5626.) *Judgment on verdict for maintenance.*
[Title.]

The defendant, C. D., having been found guilty as charged in this case, he is now therefore adjudged * by the court to be the reputed father of the said child,¹ and it is ordered that he stand charged with the maintenance thereof in the sum of — dollars; and that he pay said sum, etc. [*state time and conditions of payment*]; and also that he pay the costs of this proceeding.† For all of which execution is awarded.²

It is further ordered that the said defendant give security to the acceptance of this court for the performance of this order. And in default of such payment, or security, that he be committed to the jail of the county, there to remain until he shall comply with the requirement of court.

If the defendant has forfeited his bail, and is not in the custody of the sheriff, add (sec. 5623):]

And it appearing to the court that the recognizance of the

¹An order for maintenance, without the judgment of the court that the defendant is the reputed father of the child, is erroneous. *Devinney v. The State*, Wright, 564.

It is error for the court to render judgment simply for a gross sum, and award execution. *Ib*

²See *Darby v. Carson*, 9 Ohio, 149.

said defendant has been forfeited, and that the amount of said bond, to wit, the sum of \$——, is in the hands of the court, it is ordered that the same be applied to the payment of this judgment, and that a *capias* issue for the arrest of the said C. D.

If attached property be in the hands of the sheriff, the entry may conclude, commencing at †, as follows (by sec. 5636):—and it is ordered by the court that so much of the property attached in this case remaining in the hands of the sheriff as is necessary to satisfy this judgment be sold, as upon execution, and that the money arising therefrom be applied to the payment of the same.

381. (Sec. 5626.) *Plea of guilty, and order for maintenance.*

[*Title.*]

This day came the defendant, C. D., and confessed in court that the charge of the plaintiff herein is true.

He is therefore adjudged, etc. [*as from * in Entry No. 380a*].

382. (Sec. 5628.) *Suggestion of mother's death, etc.*

[*Title.*]

Now comes ——, and suggests to the court the death of A. B., the mother of said child; and the court being satisfied of the truth thereof, and that her said infant child, C. B., is still living, it is ordered that the name of the said child be substituted for that of the said A. B. in these proceedings. And G. H. is hereby appointed guardian *ad litem* for the said infant.

And the said G. H. now comes and in open court accepts said appointment

383. (Sec. 5630.) *Judgment reduced on death of child.*

[*Title.*]

On motion of the court, and due notice of this application being given to the said plaintiff, and it appearing that the said child, C. B., has died since the rendition of the judgment herein, it is ordered that the amount of each unpaid installment of said judgment be reduced to —— dollars.

CHAPTER IV.

CONTEMPTS OF COURT.

MISBEHAVIOR IN THE PRESENCE OF THE COURT—

384. (Sec. 5639.) Order punishing.

ACTS PUNISHABLE AS CONTEMPTS—RULE TO SHOW CAUSE—

385. (Sec. 5641.) Charge filed, and rule allowed.

386. (Sec. 5642.) Same, and bond fixed.

387. (Sec. 5642.) Continuance, and bond fixed.

388. (Sec. 5645.) Rule discharged.

389. (Sec. 5645.) Order punishing for disobedience, etc.

ATTACHMENT—

390. (Sec. 5641.) Charge filed and attachment allowed.

391. Order of, for disobedience of rule.

392. (Sec. 5645.) Order punishing for a contempt.

393. (Sec. 5645.) Order discharging attachment.

394. (Sec. 5647.) Arrest ordered.

395. (Sec. 5647.) Suit on bond ordered, etc.

396. (Sec. 5648.) Discharge from imprisonment ordered.

MISBEHAVIOR IN THE PRESENCE OF THE COURT—

The order inflicting the summary punishment provided for in section 5639 should, in all cases, be entered in the journal, as by section 5649 it is liable to be reviewed on error. It may be as follows:

384. (Sec. 5639.) *Order punishing for misbehavior.*

In the matter of the }
contempt of A. II. }

A. II. having this day been guilty of misbehavior in the presence of the court [*or, in my presence*], in this, to wit [*specify*], it is ordered and adjudged that as a punishment for said contempt he pay a fine of — dollars, and execution is awarded for the same [*or, be imprisoned in the county jail for — days, and that a warrant issue for such commitment*].

ACTS PUNISHABLE AS CONTEMPTS—

These acts are such as are enumerated in section 5640, and in other sections of the code.

In making these entries, the title of the proceedings should be as above, unless they are had in a case already on the docket, in which case they should have the title of such case. The revised statutes, differing from the former code, require a charge in writing to be made and filed with the clerk, and an entry thereof to be made on the journal. If not in a case already on the docket, the case should be docketed and numbered as a new case.

RULE TO SHOW CAUSE—

It is very customary for the party seeking to enforce an order of the court, or an act to be performed when the case is not very urgent, to have a rule to show cause first made.

385. (Sec. 5641.) *Charge filed and rule allowed.*

[*Title.*]

And now A. B., having filed with the clerk of this court certain written charges against C. D., alleging the disobedience of the said C. D. to the former order of this court, directing [*specify order, or instead of disobedience allege any offense named in section 5640 or in other statutes*], on motion of said A. B.* a rule is allowed herein against the said C. D., directing him to appear before this court forthwith [*or, on the — day of —, 18—, at — o'clock —. M.*], to show cause why he should not be punished as for a contempt for his said disobedience [*or other misconduct*].

386. (Sec. 5642.) *Same, and bond fixed.*

[*Title.*]

Add to last entry when the writ is not returnable forthwith:]

And the court fix the amount of the undertaking, which the said C. D. may give, with surety, to the satisfaction of the sheriff, for his appearance on said day and at such other times and places as the court may direct, to answer said charge, at — dollars.

On the appearance of the accused, under the above orders, he will be heard by himself or counsel, unless inconvenient at that time, in which case, or in any case of continuance, the court may require a bond from the accused for his appearance to answer the charge as follows:

387. (Sec. 5642.) *Continuance and bond fixed.*

[*Title.*]

Now came the said C. D., in obedience to the rule herein, and it being necessary to continue the case for hearing [*or*, for further hearing], it is ordered that said C. D. enter into an undertaking, with surety to the satisfaction of the clerk of this court, in the sum of — dollars, for his appearance to answer the charge against him, at such times and places as the court may direct; and in default of the same that he remain in custody of the sheriff pending these proceedings.

388. (Sec. 5645.) *Rule discharged.*

[*Title.*]

Now came the said C. D., and, upon hearing in this case, purged himself of contempt for his alleged disobedience of the order of court. And thereupon the said rule is hereby discharged at the cost of the said A. B.

389. (Sec. 5645.) *Order punishing for disobedience, etc.*

[*Title.*]

Now came the said C. D., in obedience to the rule of the court, and was examined under oath touching his alleged disobedience of the former order of the court herein. On consideration whereof, the court find him guilty of the same, and that he is thereby guilty of a contempt.

It is therefore adjudged that the said C. D. pay a fine of — dollars and the costs of this prosecution, and execution is awarded therefor [*or*, that the said C. D. be imprisoned for — months in the county jail of — county, and that a warrant issue for such commitment]. *Or both penalties may be adjudged.*

ATTACHMENT—

The attachment may be ordered in the first instance, instead of the rule, as follows:

390. (Sec. 5641.) *Charge filed and attachment allowed.*

[*Title.*]

*As in Entry No. 385 to *, and continue:]—an attachment is*

allowed to issue against the said C. D., commanding the sheriff to arrest and bring him before this court forthwith [*or, on the — day of —, 18—*], to show cause why he should not be punished as for a contempt for his said disobedience [*or other misconduct*].

Entries Nos. 386 and 387, as above, may also be made here, as well as after the rule.

If the rule as above is disobeyed, an attachment may then be ordered, as follows :

391. *Order for attachment for disobedience of rule.*

[*Title.*]

The defendant, C. D., having been duly served with a rule in this case, and having failed to obey the command thereof, an attachment as for a contempt is, on motion, allowed to issue, commanding the sheriff to arrest and bring the said C. D. before this court forthwith, [*or, on the — day of —,*] to answer for his alleged disobedience [*or other misbehavior, as set forth in entry allowing rule*].

392. (Sec. 5645.) *Order punishing for a contempt.*

[*Title.*]

Now came the said C. D. in custody of the sheriff [*or, in accordance with his undertaking of bail to the sheriff*], and was examined under oath touching his alleged contempt; on consideration whereof, the court find * that he has been guilty of the same.

It is therefore adjudged that the said C. D. pay a fine of — dollars and the costs of this prosecution, and execution is awarded therefor [*or, that the said C. D. be imprisoned for — months in the county jail of the county of —; and that a warrant issue for such commitment*]. *Or both penalties may be adjudged.*

If the act may still be performed, the order may be that he be imprisoned until he performs it; see sec. 5646.

393. (Sec. 5645.) *Order discharging attachment.*

[*Title.*]

*As in last to *, and continue:]*—that he has not been guilty of the same.

It is therefore ordered that said attachment be, and the same hereby is, discharged at the cost of the said —.

394. (Sec. 5647.) *Arrest ordered.*

[*Title.*]

And now the charge against the said C. D. being called for hearing, and the said C. D. failing to appear in accordance with his obligation, it is ordered that the sheriff again arrest and bring the said C. D. before this court forthwith [*or, at some future time*], to answer said charge.

395. (Sec. 5647.) *Suit on bond ordered, etc.*

[*Title.*]

And now the charge against the said C. D. being called for hearing, and the said C. D. failing to appear, and E. F., the surety upon his undertaking, failing to produce the body of the said C. D., in accordance with the obligation of said bond, it is ordered that said undertaking be forfeited absolutely, and that it be prosecuted to judgment and execution. It is also ordered that the sheriff again arrest and bring before this court forthwith [*or, at some future time*] the said C. D., to answer the said charge against him.

The suit upon the bond will be a civil action, conducted as other civil actions.

396. (Sec. 5648.) *Discharge from imprisonment ordered.*

[*Title.*]

Modify Entry No. 300 to the circumstances of the case.

CHAPTER V.

DISSOLUTION OF CORPORATIONS.

397. (Sec. 5654.) Order that notice be given.

398. (Sec. 5656.) Order dissolving and appointing receiver.

399. (Sec. 5669.) Dividend to creditors ordered.

- 400. (Sec. 5669.) Dividend to stockholders ordered.
- 401. (Sec. 5670.) Account of receiver referred.
- 402. (Sec. 5671.) Account of receiver allowed.
- 403. (Sec. 5673.) Officers ordered to make showing, etc.
- 404. (Sec. 5676.) Vacancy in board of trustees declared, and remaining ones empowered to act.
- 405. (Sec. 5676.) Vacancy declared, etc., and new trustees appointed.

397. (Sec. 5654.) *Order that notice be given, etc.*

[*Title.*]

This cause coming on for hearing on the petition for the dissolution of the —, a corporation, and on the accounts and inventories of said corporation, and the affidavits of the applicants, and said application conforming in all respects to the requirements of law, it is now ordered that all persons interested in said corporation having any cause to show why it should not be dissolved, appear before A. S. L., a master commissioner of this court [*or*, A. S. L., whom the court hereby appoints referee], on the — day of —, 18—, at his office, No. — —, street, Cincinnati, Ohio, and that then and there a hearing of the same be had; and that said master commissioner [*or*, referee] make due report to this court of all testimony taken in reference thereto, as well as of the property, effects, debts, credits and engagements of said corporation, and of all other matters and things pertaining to its affairs.

398. (Sec. 5656.) *Order dissolving corporation and appointing receiver.*

[*Title.*]

And now this cause coming on for hearing on the report of A. S. L., as referee [*or*, master commissioner], and it thereby appearing to the court that said corporation is insolvent [*or*, *state any of the causes provided in the above section*], and no good cause to the contrary being shown, it is therefore ordered and adjudged by the court that said corporation, the — be dissolved, and L. W. is hereby appointed receiver of all the estate and effects of said dissolved corporation. It is further ordered that the penalty of the undertaking to be given by said receiver be fixed at \$—.

And now came the said L. W. and presented his said under-

taking, with L. E. and R. S. as sureties, to the approval of the court, and was duly sworn as such receiver.

399. (Sec. 5669.) *Dividend to creditors ordered.*

[*Title.*]

On motion to the court, and upon showing made by the receiver herein, it is ordered that a cash dividend of — per cent be distributed to the creditors of the said corporation.

400. (Sec. 5669.) *Dividend to stockholders ordered.*

[*Title.*]

On motion to the court, and it being shown that there remains a surplus of cash in the hands of the receiver herein, to wit, the sum of — dollars, after payment of all the expenses of this proceeding, and payment of the creditors of the corporation in full, it is ordered that said receiver distribute the same as a dividend among the stockholders of the corporation.

401. (Sec. 5670.) *Account of receiver referred, etc.*

[*Title.*]

And now A. S. L., the receiver herein, having filed his account with this court, it is ordered that it be referred to J. S. C., as referee [*or*, a master commissioner of this court], who is hereby appointed to examine and report to this court upon the same.

402. (Sec. 5671.) *Account of receiver allowed.*

[*Title.*]

And now this cause coming on for hearing upon the report of J. S. C., referee [*or*, master commissioner], to whom was referred the account rendered herein by A. S. L., receiver, and upon all the evidence taken in reference to said account, the court find said account correct and satisfactory, and allow the same; and it is ordered and decreed that said account be final and conclusive upon all the creditors and stockholders of said corporation, and upon all persons having claims against or engagements with it.

It is further ordered that A. S. L., the said receiver, be allowed for his services herein the sum of \$—, and that J. S.

C., referee, be allowed the sum of \$——, and that the receiver pay the same out of any moneys in his hands belonging to said corporation.

403. (Sec. 5673.) *Officers ordered to make showing, etc.*

[*Title.*]

And now this cause coming on for hearing on the petition of the owners of more than one-fifth in amount of the paid up stock of the ——, a corporation organized for manufacturing [*or, mining*] ——, for the dissolution of said corporation, and upon the allegation in said petition that [*make statement as in above section*], it is ordered by the court that the officers of said corporation, within —— days, file in this court [*specify the inventories, accounts, etc., in section 5652*].

Subsequent entries same as above.

404. (Sec. 5676, 5677.) *Vacancy in board of trustees declared, and remaining ones empowered to act.*

[*Title.*]

And now this cause coming on to be heard on the petition and the evidence, the court find that the said C. D. and E. F., the parties named therein, were directors of the Ohio Coal Company at the time it expired by limitation [*or, of its dissolution*], and that, as such, they now refuse [*or, neglect*] to act, and that thereby the last board of directors of said expired [*or, dissolved*] corporation is unable to act in closing up its affairs. It is therefore ordered and adjudged that the places of said directors so refusing to act be, and they hereby are, declared vacant,* and that the remaining directors, to wit, C. R. W. and J. R. D., be, and they hereby are, empowered to perform the duties of trustees, as provided by law, in settling up the affairs of said expired [*or, dissolved*] corporation.

† It is also ordered that the said C. D. and E. F. convey, by good and sufficient deed, all real estate, and assign over all rights, in them vested as such trustees, and deliver all books and papers touching the affairs of the corporation, to the trustees here named.

And in default of the said conveyance and assignment, within —— days from the entry hereof, it is ordered that this

decree have the same force and effect, and be in all respects as available, as such deed and assignment would be to convey the premises and rights here named to said trustees.¹

405. (Sec. 5676.) *Vacancy declared, etc., and new trustees appointed.*

[*Title.*]

*As in last to *, and continue:]*—And the court appoint W. M. and C. S. as trustees, and they are hereby empowered to act as such, with those remaining, in settling up the affairs of said expired [or, dissolved] corporation, with all the powers that would by law belong to its last board of directors in that behalf. [*Conclude, if necessary, as from †, in last.*]

CHAPTER VI.

DIVORCE AND ALIMONY.

406. (Sec. 5695.) Finding in decree by default.

407. (Sec. 5695.) Decree for divorce and alimony.

408. Decree for defendant, refusing divorce.

409. (Sec. 5702.) Decree of divorce, or for alimony, for defendant, on cross-petition.

410. (Sec. 5701.) Order for alimony pendente lite.

411. (Sec. 5703.) Decree for alimony on petition.

MARRIAGE VOID AB INITIO—

412. Decree declaring.

HUSBAND WASTING PROPERTY—

413. (Sec. 5705.) Decree enjoining.

Where the evidence fails, the cause may, under certain circumstances, be continued, and the court will in a proper case then give leave to

¹ But the order may also be enforced by process as other orders of court. Sec. 5677.

amend, and enjoin the husband from interfering with the children or property in the possession of the wife, pending the suit.¹

406. (Sec. 5695.) *Finding in decree by default.*²

[*Title.*]

Now came the plaintiff, and the defendant having been duly served with summons and a copy of the petition herein, [*or, having been legally summoned by publication*], and having failed to appear, the court find — in default for answer and demurrer to said petition, and find that the allegations thereof are confessed by — to be true. The court also find † [*continue as from †, in next decree*].

407. (Sec. 5695.) *Decree for divorce and alimony.*

[*Title.*]

This cause came on this day to be heard on the petition, the answer of the defendant, C. D., and the evidence, and on consideration thereof, the court find † that the plaintiff, at the time of filing — petition, had been a resident of the State of Ohio for one year next preceding the same,³ and was at that time a *bona fide* resident of this county of — [*or, that the cause of complaint arose or took place in this county of —*³], and that the parties hereto were married, as in said petition set forth.

The court further find, upon the evidence adduced, that the defendant has been guilty of [*here state cause of divorce*].* and that by reason thereof the plaintiff is entitled to a divorce, as prayed for.

It is therefore ordered and adjudged by the court that the marriage contract heretofore existing between the said A. B. and C. D. be, and the same hereby is, dissolved, and both parties are released from the obligations of the same.

It is further ordered that the custody, care, education, and control of the said children of the parties hereto be, until further order, confided to the said — exclusively. And the — is hereby enjoined from interfering in any manner with

¹ Wilson v. Wilson, 1832, W. 128.

² Where service has been made by publication, and the defendant fails to appear, an order should be made approving the publication, as in Entry No. 33.

³ Sec. 5690.

either of said children, or with the — in — custody of them, and from visiting said children until further order of court.¹

[*Or, the other party may be given the privilege of visiting said children, as the court may direct, in form as follows:*—But it is hereby ordered that the — have the privilege of visiting said children twice each week, on Tuesdays and Fridays, between the hours of 3 and 5 o'clock P. M.; and any violation of this privilege by either party may be reported to this court.¹

And the court find that the plaintiff is the owner of the following described real estate, not heretofore disposed of, to wit [*describe specifically*], and the same is hereby restored to her divested of all and every claim, title, and interest by curtesy or otherwise of her said husband.²

It is further ordered and adjudged that the said plaintiff have and possess as and for alimony the following described real estate,³ to wit [*describe specifically*]. And the said defendant is hereby ordered to convey said premises and the improvements thereon, and all the appurtenances thereto appertaining and belonging, to said plaintiff, her heirs and assigns forever, by a good and sufficient deed in fee simple, free from any right or claim of said defendant to any estate by the curtesy, or otherwise, therein. And it is further ordered that upon the failure of said defendant to execute said conveyance within five days from the entry hereof, that this decree shall operate as such conveyance,⁴ and in that case it is ordered that the clerk cause so much of this decree to be recorded in the office of the recorder of this county as will show such change of title.⁵

And it is further ordered and adjudged that said plaintiff

¹ The jurisdiction of the court is continuing, and may, on proper application, be invoked to modify orders originally made in respect to the custody of children. *Hoffman v. Hoffman*, 15 Ohio St. 427.

² Sec. 5699. Proper, when the divorce has been granted by reason of the husband's aggression.

³ Sec. 5699. Where alimony is allowed in real estate, under sec. 7 (5699), the absolute title in fee may be decreed. *Broadwell v. Broadwell*, 21 Ohio St. 657.

⁴ By sec. 5318. For an order that a master make conveyance, see Entry No. 289, *ante*.

⁵ Sec. 4138.

do also have, possess, and enjoy, as and for alimony, the following personal property, with the right to use, sell, or dispose thereof, at her pleasure, to wit: All her wearing apparel, and all the household and kitchen furniture now in the possession of said plaintiff, and situate in the premises above described.

It is further ordered and adjudged that the defendant pay to the plaintiff as her reasonable alimony in money the sum of — dollars, payable [*as the court may direct*]. And the same is hereby made a lien upon all the real estate of the said defendant.¹ And in default of any such payment for three days, execution is allowed to issue therefor.

It is further ordered that the petitioner be, and she hereby is, restored to her maiden name of C. P.²

It is further considered by the court that the said — recover from the said — her costs herein expended. [*Or, that the plaintiff pay the costs of this proceeding; and execution is awarded.*]

408. *Decree for defendant refusing divorce.*

[*Title.*]

This cause came on this day to be heard on the pleadings and the evidence, and on consideration thereof the court find that the defendant has not been guilty of [*the charge of the petition*], as charged by the said plaintiff, but has in all respects conducted himself [*or, herself*] as a good and faithful husband [*or, wife*].

It is therefore considered by the court that the petition herein be, and the same hereby is, dismissed at the cost of the said —.

409. (Sec. 5702.) *Decree of divorce, or for alimony, for defendant on cross-petition.*

[*Title.*]

Now came the parties herein, and thereupon this cause came on for hearing on the petition of the plaintiff, the an-

¹ A decree for alimony, to be paid by installments, does not operate as a lien upon the real estate of the defendant, unless made a charge thereon by the decree itself. *Olin v. Hungerford*, 10 Ohio, 269.

² See note 2, preceding page.

swer and cross-petition of the defendant, and the evidence; on consideration whereof, the court find that the plaintiff, at the time of filing — petition, had been a resident of the State of Ohio for one year next preceeding the same, and was at the time a *bona fide* resident of the county of —, and that the parties were married as stated in the petition.

The court further find that the defendant has not been guilty of the neglect and misconduct as charged in the petition, but has in all respects conducted — as a good and faithful —, and the said petition is therefore dismissed.

The court further find upon the cross-petition and the evidence, that the plaintiff has been guilty of [*here state cause of divorce, and continue in form as from §, in decree for plaintiff, No. 407, or, if for alimony, No. 411.*]

410. (Sec. 5701.) *Order for alimony pendente lite.*

[*Title.*]

On motion of the — herein, by her attorney, and good cause being shown, it is hereby ordered that she be allowed the sum of — dollars per month for the support and maintenance of herself [and minor children] during the continuance of this action, and that she also be allowed the sum of — dollars as and for her expenses in conducting this action. [*Or, her defense.*]

It is therefore ordered that the said — pay to the said —, or her attorney, J. R., the sum of — dollars immediately upon [*or, within — days after*] the service of this order: and also the said sum of — dollars upon the first day of each and every month during the continuance of this action. And in default of any of such payments for three days, execution is allowed to issue therefor.

The court may further order:]

It is further ordered that the said A. B. have the possession and use of the household furniture [*describe sufficiently to make definite*], during the pendency of this suit; and the said C. D. is hereby enjoined from interfering with, or disturbing her in the possession and use thereof.¹

¹ Edwards v. Edwards, W. 308.

411. (Sec. 5703.) *Decree for alimony on petition.*

[Title.]

Find as in No. 406 or No. 407, according to circumstances, to †, *and continue:*—that the plaintiff was, at the time of filing her petition, a bona fide resident of this county of ———¹ [*or, that the cause of complaint arose in this county*].¹

The court further find upon the evidence that the defendant has been guilty of [*here state one of the causes mentioned in sec. 5702*].* and that by reason thereof the plaintiff is entitled to alimony out of the estate of her husband, the said defendant.

It is therefore ordered and adjudged that the said plaintiff do have and possess as and for alimony the following described real estate,² to wit: [*describe specifically*]. And the said defendant is hereby ordered to convey said premises and the improvements thereon, and all the appurtenances thereto appertaining and belonging, to said plaintiff, her heirs and assigns forever, by a good and sufficient deed in fee simple, free from any right or claim of said defendant to any estate by the curtesy, or otherwise, therein. And it is further ordered that upon the failure of said defendant to execute said conveyance within five days from the entry hereof, that this decree shall operate as such conveyance,³ and in that case it is ordered that the clerk cause so much of this decree to be recorded in the office of the recorder of this county as will show such change of title.⁴

And it is further ordered and adjudged that said plaintiff do also have, possess, and enjoy, as and for alimony, the following personal property, with the right to use, sell, or dispose thereof, at her pleasure, to wit: All her wearing apparel, and all the household and kitchen furniture now in the possession of said plaintiff, and situate in the premises above described.

It is further ordered and adjudged that the defendant pay to the plaintiff as her reasonable alimony in money the sum of ——— dollars, payable [*as the court may direct*]. And the same is hereby made a lien upon all the real estate of the

¹ By sec. 5690.² See note 3, p. 216.³ See note 4, p. 216.⁴ By sec. 4138.

said defendant.¹ And in default of any such payment for three days, execution is allowed to issue therefor.

It is further ordered that the custody, care, education, and control of the said children of the parties hereto be, until further order, confided to the said — exclusively. And the — is hereby enjoined from interfering in any manner with either of said children, or with the — in — custody of them, and from visiting said children until further order of court.²

[*Or, the other party may be given the privilege of visiting said children, as the court may direct, in form as follows:—*But it is hereby ordered that the — have the privilege of visiting said children twice each week, on Tuesdays and Fridays, between the hours of 3 and 5 o'clock, P. M.; and any violation of this privilege by either party may be reported to this court.³]

And the court find that the plaintiff is the owner in fee simple of the following described real estate, to wit [*describe*], and the same is therefore restored to her, divested of all and every claim, title, and interest of her said husband.³ And it is further ordered and adjudged that the said plaintiff have and be invested with the right and power of a *feme sole* to acquire, hold, manage, and dispose of property, money, and choses in action, and to bring and maintain suits in her own behalf, free from the control or interference of her said husband.

[*Or, the court, instead of the last paragraph, may order:—*And the court finding that the plaintiff is the owner of certain real estate, to wit [*describe*], it is therefore ordered that W. P. and E. C. be, and they hereby are, appointed trustees for the said plaintiff, and are invested with the title of said real estate, with power to hold and manage the same for her use and benefit; also, with power to acquire, hold, manage, and dispose of property, money, and choses in action belonging

¹ See note 1, p. 217.

² The jurisdiction of the court is continuing, and may, on proper application, be invoked to modify orders originally made in respect to the custody of children. *Hoffman v. Hoffman*, 15 Ohio St. 427.

³ By sec. 5703.

to her, for her use and benefit, and to bring and maintain suit in her behalf.]

It is further ordered that the said defendant pay the costs herein, taxed at \$——, within five days, or that execution be allowed to issue therefor.

Sec. 5704. For order changing venue, see Entry No. 29.

MARRIAGE VOID AB INITIO—

The marriage contract of one affected with congenital imbecility of mind to a degree rendering him incapable of consent, is void *ab initio*, and a court of chancery may declare such marriage a nullity.³

412. Decree declaring marriage void *ab initio*.

[*Title.*]

*Finding III., page 99, or IV., page 100, to *, and continue:*]—as claimed in the petition, that, at the time the marriage contract between the said A. B. and C. D. was entered into, the said A. B. was, by reason of mental imbecility, incapable of making any valid consent to the said contract.

It is therefore considered and decreed that the marriage contract between the said A. B. and C. D. be, and the same hereby is, declared *ab initio* null and void, and of no force and effect to bind either of the said parties. [*Conclude with any further order the court may make.*]

HUSBAND WASTING PROPERTY—

413. (Sec. 5705.) Decree enjoining husband from disposing of property, etc.

[*Title.*]

As in No. 406, or in No. 407, according to circumstance, to †, and continue:]—that the defendant is, as alleged in the petition, about to waste and squander the property of the plaintiff, consisting of [*specify*].

It is therefore adjudged and decreed that the defendant, C. D., be, and he hereby is, perpetually enjoined from disposing of, or otherwise interfering with, her said property.

And it is further ordered that C. H. A. be, and he hereby

¹Waymire v. Jetmore, 1872, 22 Ohio St. 271.

is, appointed receiver¹ of said property, to take possession of, and to manage and control the same for the benefit of said plaintiff. And the said defendant, and all other persons having any of said property in their possession or under their control, are hereby ordered to deliver the same to the said C. H. A. upon his demand.

And it is ordered that, before entering upon his duties, such receiver execute to the said plaintiff an undertaking, conditioned according to law, in the sum of \$——.

And now came the said C. H. A., and presented his said undertaking, with W. P. and J. R. D. as his sureties, to the approval of the court, and was duly sworn as such receiver.

And it is further ordered that the defendant pay all the costs of this proceeding.

CHAPTER VII.

DOWER.

414. (Sec. 5708.) General decree for dower.

414a. (Sec. 5714.) Decree for assignment of dower, as of a third part of rents, issues, and profits.

415. (Sec. 5708.) Decree for dower in property sold by husband without joinder of wife.

CONFIRMATION—

416. (Sec. 5713.) Decree of confirmation, when dower has been assigned by metes and bounds.

417. (Sec. 5713.) Confirmation, where commissioners have, under general decree, assigned dower of rents, etc.

417a. (Sec. 5713.) Decree of confirmation, when dower was decreed as of rents, etc.

RECOVERY OF LAND FRAUDULENTLY ASSIGNED AS DOWER—

418. (Sec. 5717.) Decree for recovery, etc.

DISCHARGING LAND OF DOWER OF INSANE WOMAN—

419. (Sec. 5722.) Committee appointed to examine, etc.

420. (Sec. 5723.) Insanity found, and appraisal ordered.

421. (Sec. 5724.) Decree for conveyance in fee, etc.

422. (Sec. 5724.) Decree for conveyance for life, etc.

423. (Sec. 5724.) Decree ordering investment, etc.

¹ See sec. 5587, and Entries Nos. 354, *et seq.*

BARRING DOWER OF INSANE PERSON.

424. (Sec. 5725.) Order for securing money to her use by mortgage.

425. (Sec. 5725.) Final decree.

If it is not shown to the court that the premises in which the dower is asked are entire, and can not be divided by metes and bounds, a general decree will be entered providing for the assignment of dower by metes and bounds, or of a third part of the rents, issues and profits.

If it be shown to the court that such premises are entire, the decree may provide, under sec. 5714, only for assignment of dower as of a third part of the rents, issues and profits.

414. (Sec. 5708.) *General decree for dower.*

[*Title.*]

And now this cause coming up for hearing upon the petition [*if other pleadings have been filed, name them*] and the evidence, the court find that all of the defendants have been duly served with summons herein [and are in default for answer.]

The court further find that the said J. B. was, in his lifetime, seized in fee simple of the real estate and premises described in the petition [*or, state other interest held at time of decease provided for by statute*], and that the plaintiff is the widow¹ of the said J. B., deceased; [that the said J. B. died leaving a last will and testament, which was duly proven and admitted to probate; that the said plaintiff has appeared in the Probate Court of this county, and elected not to take under the said will]; and that she is entitled to have her dower in the said premises assigned and set off to her, as prayed in her said petition.*

It is therefore ordered, adjudged and decreed by the court that the said plaintiff be endowed of one full equal third part of the premises described in the petition [if they can be divided by metes and bounds. If said premises are entire and can not be so divided, then it is ordered that dower be assigned as of a third part of the rents, issues and profits thereof];²

¹ By amendment of April 3, 1889, 86 v. 184, a widower is given the same right of dower as a widow, and the decrees will be in the same form as for a widow.

² By sec. 5714. This clause in brackets need not be put in the decree if it is known that the premises can be divided by metes and bounds.

and that a writ issue to the sheriff of — county, commanding him that by the oaths of E. F., G. H., and J. K., three judicious, disinterested men of the vicinity, in the said county, who are not of kin to either of the parties,¹ and who are hereby appointed commissioners for that purpose, he cause to be set off and assigned the dower to said plaintiff, in manner as above ordered. And that of such proceedings, together with the said commissioners' appraisement of the yearly net value of said real estate, estimated from the — day of — to the day of such assignment of dower, the said commissioners and the said sheriff make return without unnecessary delay [*or at some appointed time.*²]

414a. (Sec. 5714.) *Decree for assignment of dower as of a third part of the rents, issues and profits.*

[*Title.*]

*As in last to * and continue:]—*

And the court finding from satisfactory evidence that said estate is entire, and can not be divided by metes and bounds, it is therefore ordered, adjudged and decreed that dower be assigned to the said plaintiff as of a third part of the rents, issues and profits of the premises described in the petition, and that a writ issue to the sheriff of — county commanding him that by the oaths of E. F., G. H., and J. K., three judicious, disinterested men of the vicinity in the said county, who are not of kin to either of the parties,¹ and who are hereby appointed commissioners for that purpose, he cause the dower of the said A. B. to be set off and assigned in manner as above ordered. And that if his proceedings, together with the said commissioners' appraisement of the yearly net value of said estate, estimated from the — day of — to the day of such assignment of dower, he make due return [*or at some appointed time.*²]

¹ By sec. 5712.

² By sec. 5713.

415. (Sec. 5708.) *Decree for dower in property sold by husband without joinder of wife.*¹

[*Title.*]

And now this cause coming on for hearing on the petition [*if other pleadings, name them*] and the evidence, the court find that all of the defendants have been duly served with summons [and are in default for answer.]

The court further find that the defendant is in possession of the premises described in the petition, claiming to own the same in fee simple, and has so been in possession since the — day of —, 18—.

The court further find that the plaintiff was married to the said M. B., as in her petition set forth, and that the said M. B. is now deceased; that during said coverture the said M. B., from whom the title of the defendant is derived, was seized of the real estate in the petition described as an estate of inheritance [*or, state other interest held at time of decease, as provided for by statute*], and that the same was sold at judicial sale as the property of the said M. B., in proceedings to which this plaintiff was in no manner made a party, or her appearance in any way effected. And the said proceedings did not bar her right to dower in the said premises, and that she is entitled to have the same set off and assigned to her, as prayed for in her said petition [*conclude as from* in No. 414, or, as in last decree, according to circumstances.*]

CONFIRMATION—

416. (Sec. 5713.) *Decree of confirmation when dower has been assigned by metes and bounds.*

[*Title.*]

This cause came on for hearing upon the return of the sheriff and of the commissioners herein, of their proceedings in the assignment of dower under the former order of this court, and on the motion to confirm the same. And the court being fully advised in the premises, find said proceedings and assignment in all respects in conformity to law, and hereby approve and confirm the same.*

¹See note 1, p. 223.

It is therefore ordered and decreed that the said A. B. have and possess the lands so assigned, to wit [*describe*], as and for her [*or, his*] reasonable dower in said premises.

It is further ordered that the said defendant pay to said plaintiff the sum of — dollars, being one-third of the sum returned by said commissioners as the net value of said premises, from the time of filing this petition to the assignment of dower.¹

It is further ordered [*as to costs see section 5718.*]

417. (Sec. 5713.) *Confirmation where the commissioners have under the general decree [No. 414] assigned dower of rents, issues and profits.*

[*Title.*]

This cause now came on for hearing upon the return of the sheriff and of the commissioners herein, of their proceedings in the assignment of dower under the former order of the court, and on the motion to confirm the same. And it appearing from the report of said commissioners that dower could not be assigned in said premises by metes and bounds, and that they have assigned the same as of a third part of the rents, issues, and profits, in the annual sum of — dollars, the court find said proceedings in all respects in conformity to law, and do hereby approve and confirm the same.

It is therefore considered that the said A. B. do stand endowed of the rents, issues, and profits of the said premises in the annual sum of — dollars. And the said premises are hereby charged* with the payment of the same on the — day of — of each and every year of the natural life of the said A. B.

It is further decreed that the said defendant pay to the said plaintiff the sum of — dollars, being one-third of the sum returned by said commissioners as the net value of said premises from the time of filing this petition to the assignment of dower.¹

It is further ordered, etc. [*As to costs, see section 5718.*]

¹ By sec. 5715.

417a. (Sec. 5713.) *Decree of confirmation when dower was decreed as of rents, issues, and profits by decree No. 414a.*

[*Title.*]

*As in No. 416 to *, and continue:*]

It is therefore ordered and decreed that the said A. B. stand endowed as of the rents, issues, and profits of the premises described in the petition in the annual sum of \$——, as assigned to her by the said commissioners. And the said premises are hereby charged with the payment of the same.

It is further ordered that the said defendant pay to said plaintiff the sum of —— dollars, being one-third of the sum returned by said commissioners as the net value of said premises from the time of filing this petition to the assignment of dower.¹

It is further ordered, etc. [*As to costs, see section 5718.*]

RECOVERY OF LAND FRAUDULENTLY ASSIGNED AS DOWER—

For remarks concerning recovery of land, and for forms when the case is tried by jury, see, *post*, under section 5781.

418. (Sec. 5717.) *Decree for recovery of land fraudulently assigned as dower.*

[*Title.*]

If rendered on trial by the court use Finding III., page 99; if by default, Finding IV., page 100, and continue:]

The court further find that the dower heretofore assigned to the said C. D., in the premises described in the petition, was assigned by fraud and collusion with the guardian of the plaintiff, then a minor, and that said C. D. was not entitled to dower in the said premises.

And the court find that the plaintiff, as heir-at-law of ——, has a legal estate in, and is entitled to the immediate possession of,² the property described in the petition wrongfully awarded as above found to the said C. D.; and that the defendant unlawfully keeps him out of the same.

It is therefore considered and decreed by the court that the said A. B. recover from the said C. D. the real estate de-

¹ By sec. 5715.

² See sec. 5781.

scribed in the petition, to wit [*describe*], together with his costs herein expended. And it is ordered that the clerk cause so much of this decree to be recorded in the office of the recorder of this county as will show such change of title.¹

And it is ordered that a writ issue to the sheriff of — county, commanding him to put the said plaintiff in possession of the said premises.²

DISCHARGING LAND OF DOWER OF INSANE PERSON.³

419. (Sec. 5722.) *Committee appointed to examine, etc.*

[*Title.*]

This cause coming on for hearing on the petition of the plaintiff, alleging the insanity of the said C. B., and no good cause being shown to the contrary, the court appoints H. F., etc., six competent men as required by law, a committee to inquire under oath into the fact of the insanity of the said C. B., and to report in writing, without unnecessary delay, after hearing testimony in the case, the result of their investigations.

And, the said C. B. having no legal guardian, A. L. is hereby appointed guardian *ad litem* in this action to produce testimony to the above named committee.

420. (Sec. 5723.) *Insanity found, and appraisement ordered.*

[*Title.*]

And now this cause coming on for consideration on the report of the committee heretofore appointed herein, and it appearing by said report that the said C. B. is permanently insane, it is ordered that T. K. P., H. F. M., and F. M., three judicious freeholders, be, and they hereby are, appointed appraisers to appraise the real estate described in the petition, and to report in writing, without unnecessary delay, the value of each tract.

421. (Sec. 5724.) *Decree for conveyance in fee, etc.*

[*Title.*]

And now this cause coming on for hearing on the petition and all the former proceedings herein, as well as upon the report of the appraisers heretofore appointed by the court,

¹ By sec. 4138.

² See note 6, p. 117.

³ By amendment of April 3, 1889, 86 v. 186 et seq., secs. 5722-5725 inclusive are made to relate to the dower of widower as well as widow. Entries under these sections may be modified accordingly.

of their valuation of the real estate described in the petition, and upon the evidence adduced, the court find the value of the dower [*or, contingent dower*] interest of the said C. B. in said real estate * to be set off to her in fee simple to be the one-sixth [*or other proportion*] part of the same.

It is therefore ordered and decreed that the said petitioner, A. B., convey by good and sufficient deed of conveyance in fee simple to the said C. B., as and for her full [*contingent*] dower interest in the real estate described in the petition, the following tracts, to wit [*describe*].

[*Add any order that the court may make as to costs.*]

422. (Sec. 5724.) *Decree for conveyance for life, &c.*

[*Title.*]

As in last to *, and *continue*.:]—to be set off and assigned to her during life [*If she have a husband, say: during life after the death of her husband*]; to be the one-third part [*or other proportion*] of the same, and the court hereby assign to her, to be held as above, as and for her full dower interest in the premises described in the petition the following tracts, to wit [*describe*].

[*Add any order the court may make as to costs.*]

423. (Sec. 5724.) *Decree ordering investment, &c.*

[*Title.*]

As in No. 421 to *, and *continue*.:]—to be set off in money and invested by the said petitioner for the support and maintenance of the said C. B. [*after the death of her husband*], to be \$——.

It is therefore ordered and decreed that the said petitioner invest the said sum of \$—— in the stock of ——, the profits and dividends of the same to be applied to the support and maintenance of the said C. B. [*after the death of her husband*]; which said stock shall be placed in the hands of C. R. W., guardian of the said C. B., to be by him held and applied as aforesaid; and thereupon the real estate in the petition described shall be released from the [*contingent*] dower interest of the said C. B.

[*Add any order as to costs that the court may make.*]

BARRING DOWER OF INSANE WOMAN—

The proceedings in this action, under section 5725, are similar to those under the last three. Entries Nos. 419, 420, and 423 are applicable here.

424. (Sec. 5725.) *Order for securing money to her use by mortgage.*

[*Title.*]

*As in No. 421 to *, and continue :]*—to be set off in money for the support and maintenance of the said C. B. after the death of her husband, to be \$——.

It is therefore ordered that said petitioner secure the said sum of \$——, to the use of the said C. B., by good and sufficient mortgage on unincumbered real estate of double the value of said sum, and that thereupon the real estate in the petition described be released from the contingent dower interest of the said C. B.

425. (Sec. 5725.) *Final decree.*

[*Title.*]

And now this cause coming on to be considered on the petition, the former proceedings, and the evidence, and it being shown to the court that the former order for the investment [*or, securing*] of money set apart for the use of the said C. B. has been fully complied with by the petitioner, A. B., it is therefore ordered and decreed by the court that the real estate described in the petition be, and it hereby is, released and discharged from the incumbrance of the [contingent] right of dower of the said C. B.

And it is further ordered that J. N., the holder of the legal title to said premises, pay to the said A. B. the sum retained by him, to wit, \$——, as indemnity against said dower right. [*Add any order that the court makes as to costs.*]

CHAPTER VIII.

HABEAS CORPUS.

426. (Secs. 5727 and 5730.) Writ granted.
 427. (Sec. 5729.) Writ refused.
 428. (Sec. 5740.) Order continuing case on return of writ.
 429. (Sec. 5741.) Order discharging prisoner.
 430. (Sec. 5741.) Order refusing the discharge.
 431. (Sec. 5742.) Order allowing bail.
 432. (Sec. 5741.) Order giving custody of minor to petitioner.

This is one of the four great writs of which the district court is given original jurisdiction by the constitution, article 4, section 6.

The state courts have full power in habeas corpus. So also has a judge at chambers.¹ If the orders given here are made by a judge, they must be forthwith entered on the journal of the court,² as if made by the court.

426. (Secs. 5727, 82 O. L. 36, and 5730.) *Writ granted.*

[*Title.*]

Upon application of A. B., duly made, a writ of *habeas corpus* is granted, as prayed for in the petition,³ for the production of the body of said —, returnable on the — day of —, 18—.

427. (Sec. 5729.) *Writ refused.*

[*Title.*]

Application being this day made by A. B. for a writ of habeas corpus in his own behalf [*or, to obtain the custody of R. S., a minor, and it appearing that the said — is in custody of the sheriff of — county [or other officer], under process issued by the — court of —, which said court had jurisdiction to issue such process [or specify other cause in section 5729], the said writ is refused. [Add any order as to costs that the court may direct.]*]

¹ Sec. 5727.

² Sec. 5331.

³ As to form of writ, see secs. 5733 and 5734.

428. (Sec. 5740.) *Order continuing case on return of writ.*

[*Title.*]

Now came the sheriff of — county, and also brought the body of the said —, in obedience to the command of the writ of habeas corpus heretofore issued to him. And for good cause shown, the cause is now continued until the — day of —: and in the meantime it is ordered that the said — remain in the custody and safe-keeping of the said sheriff.

429. (Sec. 5741.) *Order discharging prisoner.*

[*Title.*]

Now came the sheriff of the said county of — [and made return of the writ of habeas corpus heretofore issued in this case], and also brought the body of the said A. B., petitioner herein. And upon the hearing of the case the court find that the said A. B. is * unlawfully imprisoned [*or, detained*] by the said —.

It is therefore ordered that the said A. B. be forthwith discharged from his said imprisonment. [*Add such order as to costs as the court may direct.*]

430. (Sec. 5741.) *Order refusing the discharge.*

[*Title.*]

*As in last to *, and continue:*—lawfully imprisoned [*or, detained*] by the said —.

It is therefore ordered that the said A. B. be remanded to the custody of the said —, and that he pay the costs of this proceeding [*or other order as to costs by section 5744*].

431. (Sec. 5742.) *Order allowing bail.*

[*Title.*]

*As in No. 429 to * and continue:*—lawfully imprisoned [*or, detained*] by the said —. And, on motion, it is ordered that he be let to bail upon entering into recognizance according to law, in the sum of — dollars, conditioned for his appearance at the next term of the — court, on the — day of —, to be held in and for the said county of —. And in default of such recognizance, the said A. B. shall be remanded to the custody of the said —.

432. (Sec. 5741.) *Order giving custody of minor to petitioner.*

[*Title.*]

This cause came on to be heard on the petition and the testimony, and the court being fully advised in the premises find that the said A. B. is entitled to the custody of the said E. B., and that the said E. B. is unlawfully detained by the said L. R. It is therefore ordered and adjudged that the said A. B., the mother of the said E. B., have the custody and control of said child, as prayed for in her petition: and that the — pay the costs of this proceeding.

If custody is given to any other party, the above entry will be modified to facts.

CHAPTER IX.

PARTITION.

- 436. (Sec. 5757.) Decree for partition where there is no dower to be assigned.
- 437. (Sec. 5761.) Decree for amicable partition—made by commissioners.
- 438. (Sec. 5761.) Same—without commissioners.
- 439. (Sec. 5770.) General decree for partition and assignment of dower.
- 440. (Sec. 5770.) Decree when widow's answer asking money value in lieu of dower has been filed.

CONFIRMATION—

I. WHERE PROPERTY HAS BEEN DIVIDED BY METES AND BOUNDS.

- 441. Decree of confirmation.
- 442. (Sec. 5761.) Same, in amicable partition, when deeds are ordered.

II. WHERE PROPERTY COULD NOT BE DIVIDED BY METES AND BOUNDS.

- 443. (Sec. 5762.) Decree of confirmation and distribution, when one of the parties elects to take the premises, and has settled with the other parties.
- 444. (Sec. 5762, 3.) Decree when the party electing to take the premises makes payment to the sheriff.
- 445. (Sec. 5762, 3.) Same, and is ordered to pay all costs.
- 446. (Sec. 5764.) Decree of confirmation and order for sale when no one elects to take the premises.
- 447. (Sec. 5766.) Sale subject to dower confirmed, and order for deed and distribution.

III. CONFIRMATION AND SALE WHERE PROPERTY COULD NOT BE DIVIDED BY METES AND BOUNDS, AND MONEY VALUE IS GIVEN IN LIEU OF DOWER.

448. (Sec. 5764.) Decree of confirmation and order for sale free of dower when no one elects to take the premises.
 451. (Sec. 5764.) Same—when dower or life estate extends only to an undivided interest in premises.
 452. (Sec. 5766.) Sale free of dower or life estate confirmed, and order for deed and distribution.

OTHER PROVISIONS—

453. (Sec. 5768.) Order for revaluation.
 454. (Sec. 5768.) Order to sell, without revaluation.
 455. (Sec. 5769.) Order for succeeding sheriff to make deed.

The formal part of the partition decree should be specific in stating the pleadings or in finding the defaults upon which the case is heard, as the title to real estate is concerned.

When there is a widow entitled to dower in the estate to be partitioned, the court shall order it to be assigned by the commissioners in partition, who in doing it shall be governed in all respects by the provisions prescribing the duties of commissioners to assign dower.¹ It may therefore be assigned by metes and bounds, or "as of a third part of the rents, issues and profits," the commissioners computing and ascertaining the same, and awarding to the widow an annual sum;² or, the court may, when the estate can not be divided, upon her answer asking the same, order that the estate be sold free of dower, and that she be allowed the reasonable value of her dower in money,³ which value will be ascertained by the court, based upon the tables of mortality. In the latter case the commissioners must simply appraise and return the estate free of dower, as they would if there were no dower to be assigned.

The decree for partition and dower should direct the course of the commissioners as to dower.

In case there is an undivided interest in the land subject to dower, and an appraisement of the estate is to be returned, the commissioners may assign the dower,¹ as above, of the rents, issues and profits, or if they find it to the interest of the parties they may, in their discretion, appraise the whole interest, leaving the dower interest to be valued by the court and paid out of the proceeds of the sale.⁴

In case that an undivided interest in the land is subject to a life estate, and an appraisement of the land is to be returned, the commission-

¹ By secs. 5770 and 5771.

² By sec. 5714.

³ By sec. 5719, as amended 86 v. 185.

⁴ See further, note 1, p. 245.

ers may set off the life estate, unless the tenant for life has elected to receive the value of his estate out of the proceeds of sale. In the latter case, or if the commissioners find it to the interest of the parties, they may appraise the whole interest, leaving the tenant for life to receive the value of his interest out of the proceeds of sale.¹

436. (Sec. 5757.) *Decree for partition where there is no dower to be assigned.*

[*Title.*]

And now this cause coming on to be heard upon the petition [the answers of C. D. and E. F., the answer of A. W., minor defendant, by C. R., her guardian *ad litem*] and the evidence, the court find that all of the defendants have had due legal notice of the pendency and demand of the said petition, and that [with the exception of those above named] they are in default for answer thereto.

Thereupon, the court further find that the plaintiff and the defendants hereafter named are tenants in common² in the estate described in the petition: that the plaintiff, A. B., has a legal right to the one-half thereof, the defendant, C. D., a legal right to the one-fourth part thereof, and the defendants, E. F. and G. H., each a legal right to the one-eighth part thereof: and that the plaintiff is entitled to have partition of said estate made, as prayed in his petition.

It is therefore ordered, adjudged, and decreed that partition of said estate be made in favor of all parties in interest [*or it may be only* in favor of the plaintiff]: and T. S., R. O., and W. T., three judicious and disinterested freeholders of the vicinity, are hereby appointed commissioners to make the same.*

And it is ordered that a writ of partition issue to the sheriff of — county, commanding him that by the oaths of the commissioners above named he cause to be set off and divided, to each of the above named parties [*or it may be only* to the plaintiff], the part and proportion of said estate to which they are severally [*or, to which he is*] above found entitled.

And of his proceedings herein, said sheriff is ordered to make due return.

¹ By sec. 5770. See note 1, p. 245.

² See sec. 5754.

437. (Sec. 5761, 78 O. L. 253.) *Decree for amicable partition—made by commissioners.*

[*Title.*]

And now this cause coming on to be heard upon the petition for partition, and the consent to the partition therein prayed for, entered in open court by the said C. D.,¹ in person [*or, by his attorney, C. W. G.*], the court find that the plaintiff and defendant are tenants in common in the estate described in the petition,² that the plaintiff has a legal right to three-fourths thereof, and the defendant a legal right to the one-fourth part thereof.

It is therefore ordered, adjudged, and decreed, by consent of the defendant,¹ that partition of said estate be made as prayed for in the petition [*†*], and T. S., R. O., and W. T., three judicious and disinterested freeholders of the vicinity, are hereby appointed commissioners to make the same.

[*Conclude as from * in last decree.*]

It would seem that under sec. 5761, 78 O. L. 253, by implication at least, amicable partition may be decreed by the court, in a proper case, without requiring the partition to be made by commissioners. In that case enter decree as follows:

438. (Sec. 5761.) *Decree for amicable partition—without commissioners.*

[*Title.*]

As in last decree to [†], and continue:—and it being unnecessary that commissioners be appointed to make the same, it is ordered and decreed, by consent of both parties, that the plaintiff, A. B., have and hold in severalty the part of said estate described as follows, to wit: [*describe.*] And that the defendant, C. D., have and hold in severalty the part of said estate described as follows, viz.: [*describe.*]

And the clerk is hereby directed to have so much of this decree as will show the transfer of title to the said parties, put on record in the office of the recorder of this county.³

¹ By sec. 5772, the guardian of an infant, etc., may enter the consent. In that case let the entry show that such consent was made by the guardian.

² See sec. 5754.

³ By sec. 4138.

And it is ordered that the costs of this action, including a counsel fee of \$——, to S. W., for his services herein, taxed at \$——, be paid as follows: [See sec. 5778.]

439. (Sec. 5770.) *General decree for partition and assignment of dower.*

[Title.]

And now this cause coming on to be heard on the petition [the answers of C. D. and E. F., the answer of A. W., minor defendant, by C. R., her guardian *ad litem*] and the evidence, the court find that all of the defendants have had due legal notice of the pendency and demand of the said petition, and that [with the exception of those above named] they are in default for answer thereto.

Thereupon, the court further find that the plaintiff and the defendants hereinafter named are tenants in common¹ in the estate described in the petition: that the said J. B., widow, is entitled to dower therein, and that subject thereto the plaintiff, A. B., has a legal right to the one-half of said estate, the defendant, C. D., a legal right to the one-fourth part thereof, the defendants, E. F. and G. H., each a legal right to the one-eighth part thereof: and that the plaintiff is entitled to have partition made of said premises, as prayed in his petition.

It is therefore ordered, adjudged, and decreed that partition of said estate be made, and that dower therein be assigned to the said J. B.: and T. S., R. O., and W. T., three judicious and disinterested freeholders of the vicinity, are hereby appointed commissioners to make and set off the same.*

And it is ordered that if said estate is entire, and can not be divided by metes and bounds, the dower of the said J. B. be assigned as of a third part of the rents, issues, and profits thereof,² and that said estate be appraised, subject³ to such dower interest.

¹ See sec. 5754.

² Sec. 5714.

³ If the widow has not already filed her answer, waiving the assignment of dower by metes and bounds, and asking to have the real estate sold free of dower, and that, in lieu thereof, a sum of money be paid her out of the proceeds of sale, under section 5719, and if there is a probability of her doing so after the appraisement, it will be well to order that the appraisement be made "both

And it is ordered that a writ issue to the sheriff of — county, commanding him that by the oaths of the commissioners above named he cause to be set off and divided to each of the above named parties, the part and proportion of said estate to which they are hereinbefore severally found entitled, and also cause to be set off and assigned,¹ in manner as above ordered, the dower of the said J. B.

And of his proceedings herein, the said sheriff is ordered to make due return.

440. (Sec. 5770.) *Decree when widow's answer asking money value in lieu of dower has been filed.*²

[Title.]

*As in last to *, and continue:]*

But it is ordered, upon the answer of the said J. B., that if, in the opinion of said commissioners, said estate can not be divided by metes and bounds without injury to the value thereof, no dower be assigned, and that said premises be appraised free from said dower interest.

And it is ordered that a writ issue to the sheriff of — county, commanding him that by the oaths of the commissioners above named he cause to be set off and divided to each of the above named parties, the part and proportion of said estate to which they are hereinbefore severally found entitled, and also to be set off and assigned the dower of the said J. B. if said estate can be divided, in manner as above. And of his proceedings herein the said sheriff is ordered to make due return.

I. CONFIRMATION, WHERE PROPERTY HAS BEEN DIVIDED BY METES AND BOUNDS—

441. *Decree of confirmation.*³

[Title.]

On motion to the court by the plaintiff, and upon produc-

subject to and free from the dower interest of the said J. B.," in order to save the expense of another appraisement, in case she should afterwards file such answer.

¹ By sec. 5771.

² By sec. 5719, as amended 86 v. 185.

³ If no dower has been assigned, omit the part in brackets.

ing the return of the sheriff and the report of the commissioners heretofore appointed herein, and the same having been examined by the court, and found in all respects correct, and in conformity to law and the former orders of this court, the said proceedings and report are hereby approved and confirmed.*

It is therefore ordered and decreed that the [said J. B. have and possess the lands so assigned to her, as and for her reasonable dower in said premises: and that the other]¹ said parties hold in severalty the parts and premises so set off and assigned to each respectively.

And the clerk is hereby directed to have so much of this decree, as will show the transfer of title to the several parties, put upon record in the office of the recorder of this county.²

And it is further ordered that the costs of this action, including a counsel fee of \$—— to S. and W., attorneys, for services herein,³ taxed at \$——, be paid by the said parties in the following proportions, to wit: [*As to costs, see section 5778.*]

442. (Sec. 5761, 78 O. L. 253.) *Decree of confirmation in amicable partition, when deeds are ordered.*

[*Title.*]

*As in last to *, and continue:]—*

It is therefore ordered and decreed that said parties hold in severalty the parts and premises so set off to them respectively; and on motion of the ——, the sheriff is ordered to execute and deliver to each of said parties a deed for the portion so set off and assigned to him.

And it is ordered that the costs of this action, including a counsel fee of \$——, to S. W. for his service herein, taxed at \$——, be paid as follows: [*See sec. 5778.*]

¹See note 3, p. 238.

² By sec. 4138.

³ The rule adopted by the courts of Hamilton county allows as such fees two per cent on the first ten thousand dollars of the proceeds of sale, one per cent on the second ten thousand, and one-half of one per cent on all above.

II. CONFIRMATION, WHERE PROPERTY COULD NOT BE DIVIDED BY
METES AND BOUNDS.

443. (Sec. 5762.) *Decree of confirmation and distribution, when one of the parties elects to take the premises and has settled with the other parties.*¹

[*Title.*]

This cause came on for hearing upon the return of the sheriff and the report of the commissioners heretofore appointed herein, and on the motion to confirm the same. And it appearing from said report that said estate could not be divided by metes and bounds without injury to the value thereof, and that said commissioners have [assigned dower thereof to the said J. B. in the annual sum of — dollars, as the one third part of the rents, issues, and profits of said estate², and have] made and returned their appraisement of said estate [subject to the dower of the said J. B.],¹ at \$—, the court find the said return and proceedings in all respects correct and in conformity to law, and do therefore approve and confirm the same.

[It is therefore considered and decreed that said J. B. stand endowed as of a third part of the rents, issues, and profits of the said estate in the annual sum of — dollars: and the said estate is hereby charged with the payment of the same on the — day of — of each and every year of the natural life of the said J. B.]³

And it appearing to the court that the said E. F. has elected to take the said estate at its appraised value, and has paid to the clerk of this court the costs of this case, and to the other parties herein, their respective proportions of its appraised value, the said estate [subject to the dower charge of the said J. B.],¹ is hereby adjudged to the said E. F.: and the sheriff is ordered to execute and deliver a deed to him therefor.

¹ When no dower has been assigned, omit the parts of this decree in brackets

² See secs. 5771 and 5714.

444. (Sec. 5762.) *Decree of confirmation and distribution, when the party electing to take the premises makes payment to sheriff.*

[*Title.*]

Same as last to ✽, and continue:]

And it appearing to the court that the said E. F. has elected to take the said premises at their appraised value; and that [by agreement of all parties herein]¹ the terms of payment are to be [*state terms, if other than cash. If terms are to be cash, use next decree, No. 445.*], and the court finding that the costs of this action, including a counsel fee of \$—, to S. W. for his services herein,² amount to \$—; and that there is due to the treasurer of — county, as taxes and penalty on said premises, the sum of \$—;³ it is therefore ordered by the court that upon payment being made to the sheriff by the said E. F. of his proportion of said costs and taxes, to wit, the sum of \$—, and upon his paying in cash and notes, secured by mortgage upon the premises, according to the terms of payment, the proportion of the appraised value due to the other parties, as heretofore found by the court, the said estate [subject to the dower charge of the said J. B.,] be, and it hereby is, adjudged to him, and the sheriff is ordered thereupon to make and execute to him a conveyance thereof.

And the court coming now to distribute³ the proceeds of said estate, it is ordered that the sheriff, upon receiving the same, as above, pay:

First, to the treasurer of — county, — dollars, being the taxes and penalties due on said premises.

Secondly, to the clerk of this court the costs of this action, including counsel fee, the sum of \$—.

Thirdly, to the plaintiff, A. B., in cash the sum of \$—, and also [*describe what notes*]; and to the said G. H. in cash the sum of \$—, and also [*describe what notes*], in full of their respective rights herein.

¹ By sec. 5763.

² By sec. 5778; see note 2, page 238.

³ By sec. 2854; see note 4, page 155.

⁴ If there is no dower, omit the part in brackets.

⁵ See sec. 5737.

445. (Sec. 5762, 3.) *Decree of confirmation and distribution when the party electing to take the premises is ordered to pay all cash.*

[Title.]

*As in entry No. 443 to *, and continue:]*

And it appearing to the court that the said E. F. has elected to take the said premises at their appraised value, it is ordered by the court, on good cause shown, that the proportion thereof due to the other parties be paid in cash,¹ and that upon said E. F. paying the same, together with his proportion of the costs of this case, including counsel fee of \$—, to S. W. for his services herein, and his proportion of the taxes and penalty due on said premises,² amounting in all to \$—, the said estate [subject to the dower charge of said J. B.]³ be, and it hereby is, adjudged to him; and the sheriff is ordered thereupon to make and execute to him a conveyance thereof.

And the court coming now to distribute the proceeds of said estate, it is ordered that the sheriff, upon receiving the same, as above, pay:

First, to the treasurer of — county, — dollars, being the taxes and penalty due on said premises.²

Secondly, to the clerk of this court the costs of this action, including counsel fee, the sum of \$—.

Thirdly, to the plaintiff, A. B., the sum of — dollars, and to the defendant, G. H., the sum of — dollars, in full of their respective rights herein.

446. (Sec. 5764.) *Decree of confirmation and order for sale, when no one elects to take the premises.*

[Title.]

*As in No. 443 to *, and continue:]*

And thereupon neither of said parties electing to take the said estate at its appraised value, on motion of the plaintiff, it is ordered that said estate [subject to the said

¹ By sec. 5763.

² By sec. 2854; see note 4, page 155.

³ If no dower has been assigned, omit the part in brackets.

dowercharge of the said J. B.],¹ be sold² at public auction (on the premises),³ and that an order issue therefor to the sheriff of — county.

[And on motion of the —, and for good cause shown [*or say*, And by agreement of all parties hereto], it is ordered that the sale be made for cash].³

And, in counties requiring it, the court may order, by sec. 5394:—

And on motion of the plaintiff, and for good cause shown, advertisement of sale in a German newspaper is hereby dispensed with.

And the said sheriff is ordered to return his proceedings to this court without unnecessary delay.

447. (Sec. 5766.) *Sale [subject to dower]¹ confirmed, and order for deed and distribution.*

[*Title.*]

On motion of the plaintiff, and upon producing the return of the sheriff of his proceedings and sale under the former order of this court, and the court being satisfied on examination that the same have been had in all respects according to law, the said proceedings and sale are hereby approved and confirmed. And the said sheriff is ordered by deed duly executed to convey said premises to A. P., the purchaser [subject to the dower charge of the said J. B.]¹

It is further ordered that the sheriff, out of the proceeds of sale, pay—

First, to the treasurer of — county — dollars, being the taxes and penalty due on said premises.⁴

Secondly, to the clerk of this court the costs of this action.

¹ If no dower has been assigned, omit the part of this decree in brackets.

² *Bohrt v. Atkinson*, 14 Ohio, 237. Can not be sold until all parties have declined to take. There is no direct authority for any one but the sheriff to sell in partition proceedings: but as this chapter is a part of the code, does not sec. 4968 give sufficient authority for the court to direct a master commissioner to sell? See also the case of *Dabney v. Manning*, 3 Ohio, 321.

³ May be so ordered by sec. 5765.

⁴ See note 4, p. 155.

including a counsel fee of \$—— to S. W., for his services herein, taxed at \$——.

Thirdly, to the plaintiff, A. B., the one-half of the balance of the cash payment, to wit, the sum of \$——, and also [*describe what notes*]: to the said G. H. the one-eighth part of the balance of the cash payment, to wit, the sum of \$——, and also [*describe notes; and so continue to all parties*].

III. CONFIRMATION AND SALE WHERE PROPERTY COULD NOT BE
DIVIDED BY METES AND BOUNDS, AND MONEY VALUE IS GIVEN
IN LIEU OF DOWER—

448. (Sec. 5764.) *Decree of confirmation and order for sale—
when no one elects to take the premises.*

[*Title.*]

This cause came on for hearing upon the return of the sheriff and the report of the commissioners heretofore appointed herein, and on the motion to confirm the same. And it appearing that said estate can not be divided by metes and bounds without injury to the value thereof, and that said commissioners have made and returned their appraisement thereof, free from the dower of the said J. B.,¹ in the sum of \$——, the court find the said return and proceedings in all respects correct and in conformity to law, and do therefore approve and confirm the same.

And thereupon neither of said parties electing to take the said estate at its appraised value, and the said J. B. having by her answer waived her dower by metes and bounds, and asked that in lieu thereof its value be paid her in money,² on motion of the plaintiff, it is ordered that said premises be sold³ at public auction (on the premises),⁴ free of the dower of the said J. B.,² and that an order issue therefor to the sheriff of —— county.

[And on motion of the ——, and for good cause shown [*or say*, And by agreement of all parties hereto], it is ordered that the sale be made for cash].⁴

¹ As provided by sec. 5719.

² Sec. 5719.

³ See note 2, p. 243.

⁴ See sec. 5765.

And, in counties requiring it, the court may order, by sec. 5394:]—

And on motion of the plaintiff, and for good cause shown, advertisement of sale in a German newspaper is hereby dispensed with.

And the said sheriff is ordered to return his proceedings to this court without unnecessary delay.

451. (Sec. 5764.) *Same—when dower or life estate extends only to an undivided interest in premises.¹*

[*Title.*]

Same as last decree, substituting “life estate” for “dower,” where proper.

452. (Sec. 5766.) *Sale, free of dower or life estate, confirmed, and order for deed and distribution.*

[*Title.*]

On motion of the plaintiff, and upon producing the return of the sheriff of his proceedings and sale, under the former order of this court, and the court being satisfied on examination that the same have been had in all respects according to law, the said proceedings and sale are hereby approved and confirmed. And the said sheriff is ordered by deed duly executed to convey said premises to the purchaser, A. P., free of the dower²³ [*or, life estate*]³ of the said —.

And the said — having by her answer elected to receive in lieu of her dower [*or, life estate*], its value in money, the court find the just and reasonable value thereof to be — dollars.²³

¹ By sec. 5770. This section also provides that, in case an undivided interest is subject to dower or a life estate, the commissioners may, in case an appraisement of the estate is to be returned, assign or set off the same. But in that case it would, by section 5714, be assigned as of “a third part of the rents, issues, and profits,” of such undivided interest, and selling the whole estate subject to that incumbrance would appear to be detrimental to the interests of all parties. It is probable, for that reason, that the appraisement and sale will always be free from such interest as is provided in this decree.

² See sec. 5719.

³ See. 5770.

It is further ordered that out of the proceeds of said sale the sheriff pay—

First. To the treasurer of — county, — dollars, being the taxes and penalty due on said premises.¹

Secondly. To the clerk of this court the costs of this action, including a counsel fee of \$—— to S. and W. for their services herein, taxed at \$——.²

Thirdly. To the said —, the said sum of \$——, as and for her full dower [*or, life*] interest in the said premises.

Fourthly. And of the residue of the proceeds of said sale, to the plaintiff, A. B., one-fourth of the cash proceeds, to wit, the sum of \$——, and also [*describe what notes*]. To the said defendant, C. D., one-fourth of the cash proceeds, to wit, the sum of \$——, and also [*describe what notes*]. To the said E. F., and G. H., each one-eighth of the cash proceeds, to wit, the sum of \$——, and also [*describe notes*].

OTHER PROVISIONS—

453. (Sec. 5768.) *Order for revaluation.*

[*Title.*] .

It appearing to the court that the property described in the petition herein has been — times offered for sale, and not sold for want of bidders, now, on motion of the —, it is ordered that a revaluation of said property be made by L. M., N. R., and S. T., three judicious, disinterested freeholders of the county, whom the court hereby appoint for that purpose, and that an order issue to the sheriff of said county, commanding him so to re-appraise said property, and to sell the same, as heretofore ordered, at not less than two-thirds of the revaluation.

454. (Sec. 5768.) *Order to sell without revaluation.*

[*Title.*]

It appearing to the court that the property described in the petition herein has been — times offered for sale, and not

¹ See note 4, p. 155.

² See note 3, p. 239.

sold for want of bidders, now, on motion, and it being deemed expedient for the interest of all parties concerned, it is ordered that said property may be sold for not less than — dollars; and that an order of sale issue to the sheriff accordingly.

455. (Sec. 5769.) *Order for succeeding sheriff to make deed.*

[*Title.*]

It appearing to the court that since the sale of the lands herein, the term of office of T. S., the then sheriff, has expired, and the court being satisfied that such sale was regularly made, and that the purchase-money has been fully paid [*or, secured*], it is, on motion, ordered that J. H., the present sheriff, execute and deliver to the purchaser, O. T., a deed for the lands so sold.

A similar entry may be made in case of election to take.

CHAPTER X.

REAL ACTIONS.

SUBDIVISION I. TO QUIET TITLE AND RECOVER POSSESSION.

II. OCCUPYING CLAIMANTS.

III. TO COMPLETE REAL CONTRACTS.

IV. TO SELL ENTAILED AND OTHER ESTATES.

SUBDIVISION I.—TO QUIET TITLE AND RECOVER POSSESSION.

TO DETERMINE CLAIMS ADVERSE TO ONE IN POSSESSION—

456. (Sec. 5779.) Decree quieting title and possession in plaintiff.

RECOUPMENT BY VENDEE IN ACTION FOR RECOVERY OF PURCHASE-MONEY—

457. (Sec. 5780.) Decree finding lien of third party, and for recoupment.

458. (Sec. 5780.) Finding of adverse estate, and surrender of premises ordered.

459. (Sec. 5780.) Finding of adverse estate, and order for payment of balance of purchase-money on bond being given.

RECOVERY OF REAL PROPERTY—

460. (Sec. 5781.) Decree for recovery.
 461. Decree quieting title in defendant, in an action for recovery of real estate.
 462. (Sec. 5781.) Judgment on verdict for plaintiff.
 463. (Sec. 5781.) Motion for new trial overruled and judgment for plaintiff.
 464. (Sec. 5784.) Decree for damages when right of recovery terminates during action.

TO DETERMINE CLAIMS ADVERSE TO ONE IN POSSESSION—

An action under sec. 557 (5779) of the code, to quiet title, can only be brought by a person in actual possession.¹ The decree should therefore find the possession of the plaintiff.

The remedy given by this section is a continuation of that given by the 14th section of the chancery practice act of 1831.² That act, however, differs from this in providing that “any person having the *legal title* and possession of lands, may file a petition,” etc., and under that statute the decisions of the supreme court held that a legal title must be shown to support the case. But, *query*, does the present statute go further? The supreme court of Kansas, in *Eaton v. Giles*, held that it does. They say: “Section 569, Civil Code, ’59 [same as section 5779, Ohio code], was not intended to give the right to bring an action to quiet *title*—this right existed previously—but it goes further than the remedies in the courts of chancery, which might be invoked by the holders of a legal title; it extends the remedy to any person ‘in possession by himself or tenant,’ to quiet his *possession* as against any imperfect or insufficient claim of title.”

In an action under section 557 (5779) of the code, neither party is entitled to demand a jury. The issue is triable by the court.²

456. (Sec. 5779.) *Decree quieting title and possession in plaintiff.*

[*Title.*]

If decree is rendered after trial, use Finding I., p. 99; if by default, use Finding IV., p. 100, and continue:—

The court further find that at the time of bringing this ac-

¹ *Harvey v. Jones*, 1 Disney, 65; *Eaton v. Giles*, 5 Kan. 24.

² *Ellithorpe v. Buck et al.*, 17 Ohio St. 72, 76.

tion the said plaintiff was in possession of the real property described in the petition, and that he had the legal estate in, and was entitled to the possession of, the same: that neither the defendants, nor any one of them, have any estate in, or are entitled to the possession of, said real estate or any part thereof, and that the plaintiff ought to have his title and possession quieted as against each and every one of said defendants, as prayed for in his petition.

It is therefore ordered, adjudged and decreed, that the title and possession of the said A. B. to all and singular the premises in the petition described, to wit [*describe*], be, and the same hereby are, quieted as against the defendants, and each and every one of them, and all persons claiming under them, or any of them: and they are hereby forever enjoined from setting up any claim to said premises, or any part thereof, adverse to the title and possession of said A. B., his heirs or assigns, thereto.

[*Add order as to costs.*]

RECOURPMENT BY VENDEE IN ACTION FOR RECOVERY OF PURCHASE-MONEY—

457. (Sec. 5780.) *Decree finding lien of third party, and for recoupment.*

[*Title.*]

In the decree of foreclosure of a mortgage, or for enforcement of the vendor's lien, or judgment for money, as the case may be, insert at the proper places the following:—

But the court also find on the answer and counterclaim of said defendant, and the evidence, that there has been a breach of the covenants of title given by plaintiff to defendant, as set up in said answer and counterclaim, in this, to wit, that at the time of the execution of the deed J. M. F. held and still holds a mortgage lien [*or other incumbrance*] upon said premises, the present value of which lien the court find is \$——: and that said defendant is entitled to recoup the same against the plaintiff's claim as hereinbefore found, leaving due to him the sum of —— dollars.

458. (Sec. 5780.) *Finding of adverse estate, and surrender of premises ordered.*

[*Title.*]

*Finding III., p. 99, to *, and continue:]*—that the allegations of the answer and counterclaim of the defendant are true; that there has been a breach of the covenants of title given by the plaintiff to defendant in the real estate in the petition described, in this, to wit, that at the time of the execution of the deed J. M. F. held and still holds an estate in reversion [*or otherwise: describe*] in said premises.

It is therefore considered that the claim of the plaintiff be dismissed; and the defendant assenting, it is ordered and decreed that said defendant surrender the possession of said premises, and reconvey the title thereof by deed to said A. B., upon the repayment by the said plaintiff of the part of the purchase-money paid thereon, to wit, \$——, with interest from the —— day of ——, 18—.

It is further ordered that the —— pay the costs of this action.

459. (Sec. 5780.) *Finding of adverse estate, and order for payment of balance of purchase-money, on bond being given.*

[*Title.*]

After finding amount due plaintiff in decree of foreclosure, or on vendor's lien, or in judgment, as the case may be, continue:]

The court further find, on the answer and counterclaim of the defendant and the evidence, that there has been a breach of the covenants of title given by the plaintiff to defendant in the premises hereinbefore mentioned in this, to wit, that at the time of the execution of the deed J. M. F. held and still holds an estate in reversion [*or otherwise: describe*] in the same.

It is therefore ordered and decreed that upon said plaintiff giving bond with two or more sureties to the satisfaction of the court, conditioned for the repayment of the said sum of \$——, if said defendant or his privies be evicted from said premises by reason of the said defect in the said title, the said defendant pay the balance due to plaintiff as above found due, and in default of such payment within —— days

after the tender of such bond, the defendant's equity of redemption be foreclosed, and said premises be sold, and that an order of sale issue therefor to the sheriff of — county directing him to sell said premises as upon execution, and report his proceedings to this court for further order.

RECOVERY OF REAL PROPERTY—

Section 5781 is for the recovery of real property by one out of possession. The decree in such case must find in the plaintiff a legal estate and a right of possession, both being requisite to sustain the action. The issue may be tried by a jury.¹

Section 5785 provides that the parties in an action for the recovery of real property may avail themselves, if entitled thereto, of the relief of the statutes in force for the relief of occupying claimants of lands.

460. (Sec. 5781 et seq.) *Decree for recovery of real estate.*

[*Title.*]

If given after trial, use Finding III., page 99; if by default, Finding IV., page 100, and continue:]

And the court further find that at the time the petition herein was filed the plaintiff had and still has a legal estate in, and was and is still entitled to the immediate possession of, the real property described in the petition, and that the defendant has unlawfully kept him out of the same as alleged in said petition; and the court assess the damages of the plaintiff by reason of the premises at — dollars.

It is therefore adjudged and decreed by the court that the said A. B. recover from the said C. D. the title and possession [*or, possession*] of the real property described in the petition, together with the said sum of — dollars, his damages so assessed, and also his costs herein expended;² and for said possession, damages, and costs execution is awarded.³

¹Sec. 5130. See *Ellithorpe v. Buck*, 17 Ohio St. 72.

²If the title is changed, put clause in at this place by section 4138, as follows: And the clerk is directed to have so much of this decree recorded in the office of the recorder of this county as will show such change of title.

³See sec. 5373 for extent of execution.

If the defendant desires to avail himself of the benefit of the occupying claimant's law, use addendum to decree, page 255, or Entry No. 465.

461. *Decree quieting title in defendant, in an action for the recovery of real estate.*

[*Title.*]

If given after trial, use Finding III., page 99; if by default, use finding IV., page 100, and continue:]

And the court further find that neither the plaintiff, nor any one of the defendants other than C. D., has any estate in, or is entitled to the possession of the real property in the petition described, or any part thereof; but that said defendant, C. D., is seized in fee simple, and is rightfully in possession of the several lots of land described in the petition. [*Or add special finding thus:*]*—as devisee of said A. S., deceased, whom the court find to have been the lawful owner of the same in fee simple at the time of his decease.*] The court further find that the said defendant, C. D., is entitled to the equitable relief prayed for in his answer and cross-petition, and to have his title and possession to said premises quieted.

It is therefore ordered, adjudged, and decreed that the title and possession of said C. D. to all and singular the premises in the petition described, to wit [*describe*], be quieted as against the plaintiff, and as against each and every one of his co-defendants, and all persons claiming under them, or any of them. And that said parties, and each of them, and all persons claiming under them, be, and they are hereby, enjoined from setting up any claim to said premises, or any part thereof, adverse to the title or possession of said C. D. thereto: or in any manner interfering with his use and enjoyment of the same.

It is further ordered that the costs of this suit be paid by the plaintiff and the co-defendants of said C. D., in equal proportions, and execution is awarded [*or other order as to costs*].

If the case for the recovery of real property be tried by a jury, use the usual forms, as given on p. 55 *et seq.*, and let the verdict be like the

finding of the court in one of the above decrees. Judgment on the verdict for the plaintiff may be as follows :

462. (Sec. 5781.) *Judgment on verdict for plaintiff.*

[*Title.*]

The jury in this action having, at a former day of this term, rendered a verdict finding on the issue for the plaintiff, and assessed his damages at \$——, and no motion for a new trial having been made :

It is therefore adjudged and decreed by the court that, in accordance with said verdict, the said A. B. recover from the said C. D. the title and possession [*or, possession*] of the real property described in the petition, and also the said sum of —— dollars, his said damages, together with his costs herein expended.¹

For addendum in case defendant desires to avail himself of the benefits of the occupying claimant law, see p. 255.

If a motion for a new trial is made and overruled, enter as follows :

463. (Sec. 5781.) *Motion for new trial overruled, and judgment for plaintiff.*

[*Title.*]

This cause came on for hearing, on the motion of the defendant to set aside the verdict, and for a new trial herein, and the court, on consideration thereof, do overrule the same.

It is therefore considered by the court that the said A. B. recover from the said C. D. the title and possession [*or, the possession*] of the real property described in the petition, to wit [*describe*], according to the verdict heretofore rendered herein, and also the said sum of \$——, damages as assessed by said verdict, together with his costs herein expended.¹

For addendum in case defendant desires to avail himself of the benefit of the occupying claimants law, see p. 255.

The judgment on the verdict for the defendant may simply be, that he go hence without day and recover from the plaintiff his costs herein expended. But a judgment quieting title in him, as in Entry No. 461, is perhaps better.

¹ See note 2 to Entry 460, p. 251.

464. (Sec. 5784.) *Decree for damages when right of recovery terminates during action.*

[*Title.*]

*If the decree is rendered after trial, use Finding III., p. 99 to ❖; if by default, Finding IV., p. 100, to ❖, and continue:—*that at the time this action began, the plaintiff had the legal right to, and was entitled to the immediate possession of, the real property described in his petition, but that his said title expired on the — day of —, 18—. And the court find that the said defendant unlawfully kept the plaintiff out of his said possession: and do assess the damages of the plaintiff by reason thereof at \$—.

It is therefore considered by the court that the said plaintiff recover from the said defendant the said sum of — dollars damages as aforesaid, and his costs herein expended; but that as to possession of said premises, the defendant go hence without day.

If the case was tried by a jury, use usual forms, making verdict in the form of the finding in above entry, and entering the judgment on the verdict for damages and costs. See forms of Entries No. 462 and 463, above.

SUBDIVISION II.—OCCUPYING CLAIMANT.

465. (Sec. 5788.) Entry of application, etc.

466. (Sec. 5791.) Setting aside the assessment.

Where the waste and rents exceed the value of the improvements.

467. (Sec. 5792.) Judgment for balance, in favor of plaintiff in ejectment.

Where the value of the improvements exceeds the waste and rents.

468. (Sec. 5794.) Judgment when plaintiff elects to take the land.

469. (Sec. 5795.) Judgment when plaintiff elects to take the value of the real estate.

Under the occupying claimant law, as the commissioners may be appointed upon the application of either party, it must be considered a separate proceeding from the action of ejectment, in which the party prevailing is entitled to costs.¹

¹ Martin's case, 1 Ohio, 156. See 4 Ohio, 469, 494.

Upon the rendition of the judgment of recovery of real estate against the occupying claimant, the court, at the request of either party, will cause a journal entry to be made of the application, under the act for the relief of occupying claimants of land.¹ This journal entry is the first step in the proceedings to obtain the relief under this law, and the proceedings being deemed separate from the action of ejectment, the journal entry should show by whom the application is made.

465. (Sec. 5788; 87 v. 237.) *Entry of application, etc.*

[*Title.*]

This day came the said —, and made application for the valuation of improvements and assessment of damages under the statute for the relief of occupying claimants, upon the lands, etc. [*set forth what lands*]. And the court having considered said application, and being of opinion that the said — is entitled to relief in that behalf, it is ordered that further proceedings be allowed in the premises, agreeably to the provisions of said statute.

Or the journal entry on the application may be added to the judgment of recovery, as follows:

Addendum:

And thereupon the said —, by his attorney, made application to the court for the valuation of improvements and assessment of damages under the statute for the relief of occupying claimants; and the court having considered the same, and being of opinion that he is entitled thereto, it is ordered that further proceedings be allowed in the premises, agreeably to the provisions of said statute.

Further proceedings will be as in other civil cases.¹

If either party thinks himself aggrieved by the assessment or valuation, the court may, upon motion and good cause shown, set aside the assessment, etc.

¹Sec. 5788, amended 87 v. 237.

466. (Sec. 5791; 87 v. 238.) *Order setting aside the assessment.*
[Title.]

This cause coming on to be heard, upon the motion of the said — to set aside the assessment of the jury herein; and the court having fully considered the same, for good cause shown, order that said assessment, and the proceedings of the jury and sheriff in the premises, be, and the same are, hereby set aside. And the court do further order that another valuation of improvements and assessment of damages be had in the premises, agreeably to the provisions of the act for the relief of occupying claimants, and that the same be returned to the next term of this court; to which time this cause is continued.

WHERE THE WASTE AND RENTS EXCEED THE VALUE OF THE IMPROVEMENTS.

467. (Sec. 5792.) *Judgment for balance, in favor of plaintiff in ejectment.*

[Title.]

This day came the said parties, by their attorneys, and the jury herein appointed to assess damages under the statute for the relief of occupying claimants having assessed the value of the lasting and valuable improvements made on the real estate hereinbefore described at \$—, and the damages which the land has sustained by waste at \$—, and the net annual value of the rents and profits of the land received by said defendant since receiving notice of plaintiff's title by service of summons on him, at \$—, leaving due to the said * A. B.¹ the sum of \$—.

It is therefore considered by the court that the said A. B. recover of the said C. D.² the said sum of — dollars and his costs herein expended; and execution is awarded therefor.

WHERE THE VALUE OF THE IMPROVEMENTS EXCEEDS THE WASTE AND RENTS.

When the jury find a balance in favor of the occupant, he is en-

¹ The successful claimant.

² The occupying claimant.

titled to a judgment for costs, but not for said balance. As to the balance found by the jury, the plaintiff must pay it before he can have a writ of possession.¹

468. (Sec. 5794.) *Judgment when successful claimant elects to take the land.*

[*Title.*]

*As in No. 567 to *, and continue:*—C. D.³ the sum of \$——; it is considered by the court that the said C. D. recover from the said A. B. his costs in this behalf expended, taxed at \$——.

And the said A. B.³ now here electing to take the said land, it is ordered that if within —— days from this date he shall pay to the said C. D. the said sum of —— dollars so found by said jury, and the costs above found, a writ issue to the sheriff of —— county, commanding him to put the said plaintiff in possession of the said premises, according to the former decree of this court.

469. (Sec. 5795.) *Judgment when successful claimant elects to take the value of the real estate, without improvements.*

[*Title.*]

*As in No. 467 to *, and continue:*—C. D.² the sum of \$——, it is considered by the court that the said C. D. recover from the said A. B. his costs in this behalf expended, taxed at \$——.

And the said A. B.³ now here electing to take the value of said land without the improvements, as assessed by the said jury at the sum of \$——, and to give his deed therefor, the court allow time until the —— day of ——, to the said C. D., to make payment of the said sum of \$——, above found, and also to the said A. B. to deliver to the said C. D. a good warranty deed for the land aforesaid. And upon default of payment of the said C. D. within the time so lim-

¹ Beardsley v. Chapman, 1 Ohio St. 119.

² The occupying claimant.

³ The successful claimant.

ited, a writ of possession shall then be allowed to issue in favor of the said A. B.

It is further ordered that the said — recover from the said — his costs in this proceeding expended, taxed at \$—.

SUBDIVISION III.—TO COMPLETE REAL CONTRACTS.

470. (Sec. 5799.) Judgment authorizing survivor to complete contract.

471. (Sec. 5801.) Judgment authorizing executor or administrator to complete contract.

472. (Sec. 5802.) Judgment to compel conveyance to heirs of person deceased.

470. (Sec. 5799.) *Judgment authorizing survivor to complete contract for sale.*

[Title.]

Use Finding III., page 99; or if by default, use Finding IV., page 100, and continue:]

The court further find that said G. L. on the — day of —, A. D. 18—, being then in full life, together with the plaintiff herein, became bound in writing to said R. M. for the sale of the premises in the petition described, and that the said contract has been fully performed by the said R. M.

It is therefore ordered that the plaintiff, A. B., the survivor of said parties contracting to convey, be, and he hereby is, authorized and empowered to convey to the said R. M. by deed in fee simple the lands so contracted for, according to the statute in such cases made and provided, with the same effect as if made by both of said contracting parties.

And it is ordered that the — pay the costs herein.

471. (Sec. 5801.) *Judgment authorizing executor or administrator to complete contract.*

[Title.]

Finding III., page 99; or if by default, Finding IV., page 100, and continue:]

The court further find that L. M. did on the —

day of —, A. D. 18—, being then in full life, enter in a written contract with C. F. for the sale and conveyance of premises described in the petition; and that since that time, and before the execution of said contract, the said L. M. has died, and that A. B., the plaintiff herein, has been duly appointed and qualified as his executor [*or, administrator*].

The court further find [*Here make finding of any payments on, or other part performance of, contract*], and that there still remains due on said contract from said C. F. the sum of \$—, and that the said C. F. is ready and willing to complete said contract.

It is therefore ordered and decreed that the said A. B., executor as aforesaid, make and execute on behalf of the heirs of the said L. M. to the said C. F. a good and sufficient deed in fee simple for the premises in the petition described, and upon payment of the said sum of \$— deliver the same to the said C. F.

And it is ordered that the said — pay the costs of these proceedings.

472. (Sec. 5802.) *Judgment to compel conveyance to heirs of person deceased.*

[*Title.*]

Finding III., page 99; or if by default, Finding IV., page 100, and continue:]

The court further find that the defendant, C. D., did on the — day of —, A. D. 18—, enter into a written contract with L. M., then in full life, for the sale and conveyance to him of the premises described in the petition, and that since that time, and before the completion of said contract, the said L. M. has died; and that the plaintiffs herein are the heirs-at-law [*or, devisees*] of the said L. M., and as such, are entitled to the specific execution of the said contract.

It is therefore ordered and decreed that upon full payment being made by the said plaintiffs [*or state specifically what plaintiffs are to do*] the said C. D. do, within — days from the date of this decree, convey the premises in the petition described to the said plaintiffs by good and sufficient deed in

fee simple; and that in default thereof this decree have the same operation and effect as said deed.¹

[*Add order as to costs.*]

SUBDIVISION IV.—TO SELL ENTAILED AND OTHER ESTATES.

473. (Sec. 5805.) Decree authorizing sale of entailed estates.

474. (Sec. 5807.) Decree of confirmation; order for deed and investment.

475. Bonds of trustees approved, etc.

476. (Sec. 5812.) Decree for sale of property given for a religious use.

477. Decree of confirmation, order for deed and distribution.

These sales may be made in the manner that the court considers to be to the best advantage of all parties (sec. 5805), no limitation being placed upon the discretion of the court. The sale may therefore be public or private, as the court shall direct in its decree. If a sale at public auction is directed, it may be as well to follow the statutory mode of sales upon execution, as that has been well established by statute, custom, and adjudication.

473. (Sec. 5805.) *Decree authorizing sale of entailed estates.*

[*Title.*]

Use Finding III., page 99; or if default, Finding IV., page 100, and continue:

The court further find that the plaintiff has an interest as tenant for life [*or other interest*] in the real estate described in the petition, under the will of L. B. and that the defendants, C. D. and E. F., are the heirs in tail to said real estate, as in the petition set forth.

And it being made to appear to the court by the evidence adduced that a sale of said real estate as asked in this petition would be for the benefit of said plaintiff, and would do no substantial injury to the defendants, the heirs in tail, nor to any other of said defendants, it is ordered and decreed that said real estate be sold, freed from all entailment, limitation, or condition, in the manner as by law provided in case of sales upon execution * by J. M. F., who is hereby ap-

¹ By section 5318; as to the means of enforcing conveyance, see under section 5399, Entry No. 289. If no conveyance is to be made, a clause should be added to the decree as in note 2, p. 251.

pointed to make such sale, with all the power possessed by sheriffs in such cases, upon his giving an undertaking in the sum of \$—— to the approval of the court: and that an order issue therefor to said J. M. F., directing him to appraise, advertise, and sell said premises as upon execution and bring the proceeds into court for further order.

If desired the following clause may be added to the above decree:

Addendum authorizing Private Sale.

Provided, however, that at any time before sale at public auction the said premises may be sold at private sale on terms of [*specify terms of payment*], at a sum not less than the appraised value thereof. And in that case a return of such sale, with the proceeds thereof, shall be made to this court for further order.

474. (Sec. 5807.) *Decree of confirmation; order for deed and investment.*

[*Title.*]

This cause came on to be heard on the return of J. M. F., heretofore appointed to make the sale of the premises in this case ordered to be sold, with his report of his proceedings and sale under said writ. And the court having carefully examined the said proceedings, being satisfied that the said sale has, in all respects, been fairly and legally made and in conformity to the orders of this court, and that the price obtained is the reasonable value of the estate sold, do therefore approve and confirm the same, and order that the said J. M. F. make to the purchaser a deed in fee simple for the premises so sold.

It is further ordered by the court that the proceeds of such sale, after payment of the cost of this proceeding, taxed at \$——, to wit, the sum of \$——, be invested in [*See secs. 5809 and 5811*]; and for the purpose of making such investment and managing the same, the court hereby appoints R. F. and J. N. trustees, who, before entering upon their duties as such, shall each give an undertaking to the approval of the court for the faithful performance thereof in the sum of \$——.

475. *Bonds of trustees approved etc.*

[Title.]

And now come R. F. and J. N., heretofore appointed trustees in this case, and present their undertakings in the sum of \$—— each, with S. T. and W. P. as sureties on the bond of R. F., and T. P. and W. C. as sureties on the bond of J. N.; which said bonds are hereby accepted by the court.

And it is ordered that J. M. E., by whom the sale in this case was made, turn over to these trustees all money, notes, and securities in his possession arising from said sale.

476. (Sec. 5812.) *Decree for sale of property given for a religious use.*

[Title.]

Finding III., page 99; or if default, Finding IV., page 100, and continue :]

The court further find that the premises in the petition described are held in trust by B. F. H. for the use of [*describe*], and have been abandoned for such use, by reason of [*describe*].

It is therefore ordered and decreed that said premises be sold in the manner as by law provided in case of sales upon execution, etc. [*conclude as from * in No. 473*].

Addendum for private sale may be made as under sec. 5805, page 261.

477. *Decree for confirmation, order for deed and distribution.*

[Title.]

Modify decree No. 225, page 117.

CHAPTER XI.

REPLEVIN.

FIRST. PROCEEDINGS WHEN THE PROPERTY HAS BEEN DELIVERED TO THE PLAINTIFF.

478. (Sec. 5820.) Order for sheriff to retain heirlooms.

1ST. IN CASE OF JUDGMENT, ON DEMURRER, AGAINST THE PLAINTIFF—

a. Damages assessed by the court.

479. (Sec. 5824.) Demurrer to petition sustained.

480. (Sec. 5824.) After demurrer sustained damages assessed for defendant, and judgment.

481. (Sec. 5824.) After demurrer sustained, finding against defendant, and judgment.

482. (Sec. 5824.) Demurrer sustained, judgment against plaintiff, and case continued.

483. (Sec. 5824.) Damages assessed for defendant.

484. (Sec. 5824.) Finding against defendant, and judgment for costs.

485. (Sec. 5824.) Demurrer sustained, damages assessed for defendant, and judgment.

486. (Sec. 5824.) Demurrer sustained, finding against defendant, and judgment for costs.

b. Damages assessed by a jury.

487. (Sec. 5824.) After demurrer sustained—case sent to jury.

488. (Sec. 5824.) Demurrer sustained, judgment against plaintiff, and case sent to jury for inquiry of damages.

489. (Sec. 5824.) Verdict on inquiry.

490. (Sec. 5824.) Judgment on verdict for defendant.

491. (Sec. 5824.) Judgment on verdict against defendant.

2D. IN CASE OF PLAINTIFF'S FAILURE TO PROSECUTE HIS ACTION—

a. Damages assessed by the court.

492. (Sec. 5824.) Finding for defendant, damages assessed, and judgment.

493. (Sec. 5824.) Finding against right of defendant, and judgment.

b. Damages assessed by a jury.

494. (Sec. 5824.) Verdict on plaintiff's default for or against defendant.

495. (Sec. 5824.) Judgment on verdict.

Replevin cases certified from a justice.

- 498. (Sec. 5824.) Damages assessed by the court for defendant, plaintiff being in default for petition.
- 499. (Sec. 5824.) Finding against defendant and judgment for costs, plaintiff being in default for petition.
- 500. (Sec. 5824.) Verdict of jury for or against defendant on plaintiff's default for petition.
- 501. Judgment on verdict.

3D. IN CASE OF DEFENDANT'S DEFAULT—

a. Damages assessed by the court.

- 502. Judgment by default for plaintiff.
- 503. Judgment by default for nominal damages.
- 504. Judgment by default, damages waived.

b. Damages assessed by a jury.

- 505. (Sec. 5825.) Judgment by default and case sent to jury on inquiry of damages.
- 506. Verdict on inquiry.
- 507. Judgment on verdict.

4TH. IN CASE OF SUBMISSION OF THE ISSUE TO THE COURT OR A JURY—

- 508. Finding by the court and judgment for plaintiff.
- 509. Finding by the court and judgment for defendant.
- 510. (Sec. 5825.) Verdict of jury.
- 512. (Sec. 5825.) Judgment on verdict.
- 514. Judgment on verdict in part for each.

FORMS OF VERDICT IN REPLEVIN.

- I. Verdict for plaintiff.
- II. Verdict finding right of property in defendant.
- III. Verdict finding right of possession in defendant.
- IV. Verdict finding neither right of property nor possession in defendant.
- V. Verdict finding in part for plaintiff and in part for defendant.

SECOND. PROCEEDINGS WHEN THE PROPERTY HAS NOT BEEN TAKEN, OR HAS BEEN RETURNED TO THE DEFENDANT.

FIRST. PROCEEDINGS WHEN THE PROPERTY HAS BEEN DELIVERED TO THE PLAINTIFF.

There are two conditions of the personal property, the subject of the action in replevin, to be considered. *First*, When the property has been delivered to the plaintiff at the commencement of the suit, or before answer, as provided for in section 5815 *et seq.* of the code. *Secondly*, When the property claimed has not been taken by the plaintiff,

or, if taken, has been returned to the defendant by the sheriff, for want of an undertaking, as provided for in section 5827.

When the property is taken by the plaintiff, the bond which he gives takes the place¹ of the property, as between the parties to the suit, so that the plaintiff becomes invested with full ownership of such property, with power to sell and dispose of it at pleasure, and to confer a valid title upon the purchaser.² So that, when the finding is in his favor, the court need not adjudge the property to him—he has it already. Finding and judgment may be had against the plaintiff, either on demurrer,³ on failure of prosecution by him, or on submission of the case to the court or a jury.⁴

But in neither event can there be a judgment for the defendant for the return of the property,⁵ except in the case of heirlooms. That has vested in the plaintiff, and all that the defendant can recover, except heirlooms, is the value of the property and such damages as the court or jury may assess. The verdict, if for the defendant, should find whether he had the right of property, or right of possession only to property taken; for, unless it specify the ground on which the assessment of damages is made, the court can not determine whether the damages are excessive or not. They might be excessive if the right of possession, and not excessive if the right of property was found in the defendant.⁶ If damages for defendant are assessed by the court, the same finding must be made.⁷

The case of heirlooms is specially provided for by section 5820. An order may be made that the sheriff retain them, as follows:

478. (Sec. 5820.) *Order for sheriff to retain heirlooms.*

[*Title.*]

On motion of the defendant, and it appearing that the property replevied in this case is an heirloom, and as such is valuable to this defendant, it is ordered that the sheriff re-

¹ *Jennings v. Johnson*, 17 Ohio, 154.

² *Smith v. McGregor*, 10 Ohio St. 469; followed in 14 Ohio St. 182.

³ Sec. 5824.

⁴ Sec. 5825; and as to damages being assessed by the court, on submission, see post, p. 277.

⁵ *Smith v. McGregor*, 10 Ohio St. 470.

⁶ *Hewson v. Saffin*, 7 Ohio (2 pt.), 232.

⁷ *Wolf v. Meyer*, 12 Ohio St. 432.

tain and safely keep the same, subject to the further order of this court.

The cases in which finding and judgment may be entered will be successively considered, viz. :

1. In case of judgment on demurrer against the plaintiff.
2. In case of plaintiff's failure to prosecute his action.
3. In case of defendant's default.
4. In case of submission of the issue to the court or a jury.

1ST. IN CASE OF JUDGMENT ON DEMURRER AGAINST THE PLAINTIFF—

By section 5824, judgment may be rendered by the court against the plaintiff on demurrer. And the court thereby finds against the plaintiff's right to take the property at the commencement of the suit.¹ But still, as a basis for the assessment of damages for defendant, the court or jury must find that the defendant had either a right of property or right of possession in the property taken, at the commencement of the action; for if he had neither, he can recover no damages from the plaintiff, although the plaintiff may have had no right to take the property. But he will recover costs from the plaintiff.²

Upon the demurrer to plaintiff's petition being sustained, the entry may be simply one sustaining the demurrer, leaving all findings as to right of property or possession in the parties to be made subsequently. But if the demurrer goes to the merits of the case, it will be better to enter a judgment, when the demurrer is sustained, finding against the plaintiff's right of possession, as in Entry No. 482, page 267. And if the defendant is ready with his evidence at the same time to show his right of property or possession, and the court is willing then to hear it, there is no reason why the case should not then be heard in full, and judgment entered disposing of the whole case, as in No. 485. But in cities where there is a day set apart for the hearing of demurrers, the court will not generally go into the hearing of the evidence at that time. Both forms of entries, however, are given.

479. (Sec. 5824.) *Demurrer to petition sustained.*

[*Title.*]

This cause being heard on the demurrer to the petition, the court, on consideration, sustain the same.

¹ See *Williams v. West*, 2 Ohio St. 82.

² *Rowan v. Johnson*, 2 W. L. M. 155.

a. DAMAGES ASSESSED BY THE COURT.

If no amendment is asked or made the court may, at a subsequent day, enter one of the following judgments:

480. (Sec. 5824.) *After demurrer sustained—damages assessed for defendant by the court, and judgment entered.*

[*Title.*]

The demurrer to the petition in this case having heretofore been sustained, and the plaintiff not pleading further, the court now find that at the commencement of this action the plaintiff was not entitled to the possession of the property described in the petition.

[*Conclude as from ❖, in Entry No. 485.*]

481. (Sec. 5824.) *After demurrer sustained—finding against defendant's right to damages, and judgment for costs.*

[*Title.*]

The demurrer to the petition in this case having heretofore been sustained, and the plaintiff not pleading further, the court now find that at the commencement of this action the plaintiff was not entitled to the possession of the property described in the petition.

[*Conclude as from ❖, in Entry No. 486.*]

But, instead of simply sustaining the demurrer, as in Entry No. 479, the court may at the same time render judgment against the plaintiff, and continue the case for assessment of damages, as follows:

482. (Sec. 5824.) *Demurrer sustained, judgment against plaintiff and case continued.*

[*Title.*]

This cause coming on to be heard upon the petition and the demurrer thereto, the court, on consideration thereof, find that said demurrer is well taken, and therefore sustain the same. And thereupon the court, the plaintiff not pleading further, find that at the commencement of this action the plaintiff was not entitled to the possession of the property in his petition described. And for inquiry into, and assess-

ment of, the damages to which the defendant is entitled, this case is continued for further hearing.

After the further hearing by the court, one of the two following judgments may be entered :

483. (Sec. 5824.) *Damages assessed for defendant by the court after judgment against plaintiff on demurrer, as in last entry.*

[*Title.*]

And now this cause came on for inquiry into the defendant's claim for damages, and was, on application of said defendant, submitted to the court without the intervention of a jury ❖

And thereupon the court find upon the evidence adduced that at the commencement of this action the defendant had the right of property in the goods and chattels in the petition described, and was entitled to the possession thereof [*or, had the right of possession to the said goods and chattels*],¹ and assess his damages against the plaintiff by reason of the premises at \$——.

It is therefore considered by the court that the defendant, C. D., recover from the plaintiff, A. B., the said sum of —— dollars, so assessed, together with his costs herein expended.

[And it is further ordered that the sheriff deliver over to the defendant the property heretofore taken from him and retained as heirlooms.]

484. (Sec. 5824.) *Finding against defendant's right to damages, and judgment for costs—after judgment against plaintiff on demurrer.*

[*Title.*]

As in last to ❖, and continue :—And thereupon the court find upon the evidence adduced that at the commencement of this action the defendant had neither the right of property,

¹ It is error for the court to assess the defendant's damages without the intervention of a jury, and without finding whether the defendant had the right of property, or the right of possession only, at the commencement of the action. *Wolf v. Meyer*, 12 Ohio St. 432.

nor the right of possession in the goods and chattels in the petition described.

It is now therefore adjudged by the court that both parties go hence without day, and that the defendant recover from the plaintiff his costs herein expended, taxed at \$——.

Or, at the time the demurrer is sustained, damages may be assessed by the court, and judgment be entered as in one of the two following forms:

485. (Sec. 5824.) *Demurrer sustained, damages assessed by the court for defendant, and judgment.*

[*Title.*]

This cause now coming on to be heard upon the petition and demurrer thereto, the court, on consideration thereof, find that said demurrer is well taken, and therefore sustain the same; and thereupon, the plaintiff not pleading further, the court find that at the commencement of this action the plaintiff was not entitled to the possession of the property in his petition described.✽

And thereupon, the cause being further heard by the court upon the evidence offered by the defendant, the court find that at the commencement of this action the defendant had the right of property in the said goods and chattels, and was entitled to the possession thereof [*or*, had the right of possession to the said goods and chattels], and assess his damages against the plaintiff, by reason of the premises, at — dollars.

It is therefore considered by the court that the defendant, C. D., recover from the plaintiff A. B., the said sum of \$——, so assessed, together with his costs herein expended.

If heirlooms have been delivered to sheriff, add:

And it is further ordered that the sheriff deliver over to the defendant the property heretofore taken from him and retained as heirlooms.

486. (Sec. 5824.) *Demurrer sustained, finding against defendant's right to damages, and judgment for costs.*

[*Title.*]

As in last to ✽, and continue:]

And thereupon, the cause being further heard by the court

upon the evidence adduced, the court find that at the commencement of this action, the defendant had neither the right of property nor the right of possession in the goods and chattels in the petition described.

It is therefore adjudged by the court that both parties go hence without day, and that the defendant recover from the plaintiff his costs herein expended.

b. DAMAGES ASSESSED BY A JURY.

If, after demurrer sustained, as by Entry No. 479, no amendment is asked, the court may, at a subsequent day, order that the case be sent to a jury, as follows :

487. (Sec. 5824.) *After demurrer sustained—case sent to jury.*
[*Title.*]

The plaintiff herein not pleading further, since demurrer to petition sustained, on motion of the defendant it is ordered that this case be sent to a jury to inquire into and assess the damages of said defendant.

488. (Sec. 5824.) *Demurrer sustained, judgment against plaintiff, and case sent to jury.*

[*Title.*]

As in No. 485 to ✽, and continue:]

And on motion of defendant, it is ordered that the case be sent to a jury to inquire into and assess the damages to which the defendant is entitled.

489. (Sec. 5824.) *Verdict on inquiry for or against defendant.*
[*Title.*]

And now this cause came on to be heard upon the inquiry heretofore ordered by the court. Also came the following named persons as jurors, to-wit :

1. M. B., etc.

7. C. H., etc.

who were duly impaneled and sworn according to law.

And thereupon, after hearing the evidence in the case, the argument, and charge of the court, the jury, after due deliberation, returned their verdict in writing, signed by their foreman, as follows, to-wit :

[*Copy verdict. See forms on page 279.*]

490. (Sec. 5824.) *Judgment on the verdict for defendant.*

[Title.]

The jury in this action having, on inquiry for the defendant, at a former day of this court, assessed his damages against the plaintiff at \$——:

It is therefore considered by the court that the defendant, C. D., recover from the plaintiff, A. B., the said sum of —— dollars, so assessed, together with his costs herein expended.

[And it is further ordered that the sheriff deliver over to the defendant the property heretofore taken from him and retained as heirlooms.]

491. (Sec. 5824.) *Judgment on the verdict against defendant.*

[Title.]

The jury in this action having, on inquiry for the defendant, at a former day of this court, found that he had neither the right of property nor right of possession in the goods and chattels in the petition described, and the court having before found that neither was the said plaintiff entitled to the same:¹

It is therefore considered that both parties go hence without day, and that the defendant recover from the plaintiff his costs herein expended, taxed at \$——.²

2D. IN CASE OF PLAINTIFF'S FAILURE TO PROSECUTE HIS ACTION.

This case is not so conclusive as the first. There is a mere want of prosecution, or a mere fault on the part of the plaintiff, which in no way determines his rights, and which will not preclude him from coming in and giving evidence of his right of property and right of possession in the property,³ before the jury called to assess defendant's damages. In this view, no entry need be made on the journal, of plaintiff's default or want of prosecution, until the case comes to trial. Then at a trial before the court or jury the whole question may be heard. If the plaintiff appears, he may give evidence to prove his right of possession. If not, the question is simply as to the defend-

¹ By Entry No. 488.

² See p. 266.

³ *Louden v. Clark*, 1 W. L. M. 598.

ant's right, and the amount of damages he should recover. But still, if the evidence warrants a finding or verdict for the plaintiff, the court or jury is not precluded from giving it.

In cities where the jury-room is separate from the submitted room, the defendant may, as soon as the plaintiff makes default, ask that the case be sent to the jury-room, and it will then come on for trial in its order.

Upon the hearing of the case by the court or jury, the following entries may be made :

a. DAMAGES ASSESSED BY THE COURT.

492. (Sec. 5824.) *Finding for defendant, damages assessed by the court and judgment—after plaintiff's default.*

[*Title.*]

And now the plaintiff herein failing to appear either in person or by attorney to prosecute his action, this cause came on for hearing, on application of the defendant, upon inquiry into the right of property, and right of possession of the said defendant to the property, taken by the said plaintiff, and was submitted to the court upon the evidence offered in behalf of said defendant.* [*Conclude as from *, in No. 483.*]

493. (Sec. 5824.) *Finding against right of defendant to damages, and judgment for costs—after plaintiff's default.*

[*Title.*]

*As in last to *, and continue :*—And inereupon the court find that at the commencement of this action the defendant had neither the right of property nor right of possession in the goods and chattels in the petition described.

It is therefore considered by the court that both parties go hence without day, and that the defendant recover from the plaintiff his costs herein, taxed at \$——.

b. DAMAGES ASSESSED BY A JURY.

494. (Sec. 5824.) *Verdict on plaintiff's default, for or against defendant.*

[*Title.*]

And now the plaintiff herein having failed to appear,

either in person or by attorney, to prosecute this action, the cause came on for hearing on application of the defendant, for hearing upon inquiry into the right of property, and right of possession of the said defendant to the property, taken by the said plaintiff.

Also came the following named persons as jurors, to wit:

1. M. B.,

7 C. T.,

etc.

etc.

who were duly impaneled and sworn according to law.*

And the case being submitted to the jury upon the evidence and argument for the defendant and charge of the court, the said jury, after due deliberation, returned their verdict in writing, signed by their foreman, as follows, to wit: [*Copy verdict. See forms on pages 279 and 280.*]

495. (See, 5824.) *Judgment on the last verdict.*

[*Title.*]

Same as Nos. 490 or 491.

REPLEVIN CASES CERTIFIED FROM A JUSTICE—

The most usual cases wherein the plaintiff fails to prosecute his action are those certified from a justice, in which the plaintiff fails to file his petition. The statute fixes no special time within which the petition must be filed, but it is usually done by rule of court.¹ If not, it is probable that the plaintiff is always in default until he files his petition.

Section 6618 provides that whenever the appraised value of the property so taken shall exceed three hundred dollars, the justice shall certify the proceedings upon the said writ to the court of common pleas of his county, and thereupon shall file the original papers, together with a certified transcript of his docket entries, in the clerk's office of said court, the case there to be proceeded in as if such suit had commenced in said court.

After the case is docketed in the common pleas court, the plaintiff must, within the time limited by the rule of the court, file his peti-

¹ The rule adopted by the Common Pleas Court of Hamilton county allows the same time for filing pleadings as allowed in cases appealed from a justice, by section 6598, counting from the time that the case is docketed in the common pleas court.

tion. When that is done, the case stands in all respects as if the petition had been originally filed in the common pleas, and the same entries are used.

If the plaintiff fails to file his petition, the defendant is then entitled to have the court or a jury, as in section 5824 of the code, inquire into his right of property and right of possession to the property taken. But in that case the defendant, before proceeding to have his damages assessed, should file a petition.¹

Where, in such a case, the plaintiff is in default, and the defendant has given evidence upon an inquiry of damages, the plaintiff may, in answer to the proofs of the defendant, give evidence that he is the owner and entitled to the possession of the property, and such evidence will preclude the defendant from a judgment for either nominal damages or costs.¹

498. (Sec. 5824.) *Damages assessed by the court for defendant, in case certified from a justice—plaintiff having failed to file a petition.*

[*Title.*]

And now the plaintiff herein being in default for petition, this cause, on application of the defendant, came on for hearing, upon inquiry into the right of property, and right of possession of the defendant to the property, taken by the plaintiff, and was submitted to the court without the intervention of a jury, upon the certified transcript of the proceedings of M. K., a justice of the peace [the petition of the defendant], and the evidence offered in his behalf.* [*Conclude as from **, in No. 483.]

499. (Sec. 5824.) *Finding against defendant's right to damages and judgment for costs in case certified from a justice—though plaintiff in default for petition.*

[*Title.*]

*As in last to *, and continue:*

And thereupon the court find, upon the evidence adduced, that at the commencement of this action the defendant had neither the right of property nor the right of possession in the goods and chattels in the petition described.

¹ Louden v. Clark, 1 W. L. M. 598.

It is therefore considered by the court that both parties go hence without day, and that the defendant recover from the plaintiff his costs herein expended.

500. (Sec. 5824.) *Verdict for or against defendant in case certified from a justice on plaintiff's default for petition.*

[*Title.*]

And now the plaintiff herein being in default for petition, this cause, on application of the defendant, came on for hearing upon inquiry into the right of property and right of possession of the defendant to the property taken by the plaintiff.

Also came the following named persons as jurors, to wit :

1. M. B.,

7. C. T.,

etc.

etc.

who were duly impaneled and sworn according to law.

And the case was submitted to the jury upon the certified transcript of the proceedings of M. K., a justice of the peace [the petition of the defendant], and the evidence offered in behalf of said defendant. And thereupon, after the hearing of the same, the jury, after due deliberation, returned their verdict in writing, signed by their foreman, as follows, to wit : [*Copy verdict.*]

501. *Judgment on the last verdict may be the same as Nos. 490 or 491.*

[*Title.*]

3D. IN CASE OF DEFENDANT'S DEFAULT—

a. DAMAGES ASSESSED BY THE COURT.

If the defendant is in default, the plaintiff may, "with the assent of the court," under section 5204, waive a jury, and the court may assess the damages. Or, by section 5825, a jury may assess the damages.

502. *Judgment by default for plaintiff—damages assessed by the court.*

[*Title.*]

Now comes the plaintiff herein by his attorney, and the de-

fendant being in default for answer and demurrer, the court find, upon the petition and evidence, that at the commencement of this action the plaintiff had the right of possession¹ in the property described in the petition, and that the defendant unlawfully withheld the same;² and that the plaintiff is entitled to recover his damages, by reason of the premises, from the said defendant.

And the plaintiff, waiving a jury and asking that his damages be assessed by the court, the court do now, upon the evidence adduced, assess the same at \$——.

It is therefore considered that the plaintiff recover from the defendant the said sum of \$——, together with his costs herein expended.

503. *Judgment by default for plaintiff, for nominal damages.*

[Title.]

*As in No. 502 to *, and continue:]*—and the plaintiff waiving a jury, the court assess the damages of the plaintiff therefor at one cent.

It is therefore considered that the plaintiff recover from the defendant his said damages, together with his costs herein expended.

504. *Judgment by default for plaintiff—damages waived.*

[Title.]

*As in No. 502 to *, and continue:]*—

And the plaintiff waiving all damages for the said detention, it is therefore considered by the court that the said plaintiff recover from the said defendant his costs herein expended, taxed at \$——.

¹ The only title necessary to enable a person to maintain replevin is the immediate possession of the property. It is therefore sufficient for the court or jury, in finding for the plaintiff, to find the *right of possession* in the plaintiff at the commencement of the suit. See *Williams v. West*, 2 Ohio St. 82.

² The gist of the action is the unlawful detention of the property. The assessment of damages for the plaintiff must therefore be based on such unlawful detention. See *Williams v. West*, *supra*.

b. DAMAGES ASSESSED BY A JURY.

505. (Sec. 5825.) *Judgment by default for plaintiff, and case sent to jury on inquiry of damages.*

[*Title.*]

Now comes the plaintiff herein by his attorney, and the defendant being in default for answer and demurrer, the court find, upon the petition and evidence, that at the commencement of this action the plaintiff had the right of possession in the property described in the petition, and that the defendant unlawfully withheld the same; and that the plaintiff is entitled to recover his damages, by reason of the premises, from the said defendant.

And, on motion of said plaintiff, it is ordered that the case be sent to a jury, that upon their inquiry his said damages may be assessed.

506. *Verdict on inquiry.*

[*Title.*]

[*Use Entry No. 262.*]

507. *Judgment on verdict.*

[*Title.*]

[*Use Entry No. 263.*]

4TH. IN CASE OF SUBMISSION OF THE ISSUE TO THE COURT OR A JURY—

Sections 5825 and 5826 provide for the submission of replevin cases to a jury on issue joined, and contemplate a trial as in other jury cases.

These sections do not provide for a trial by the court, without a jury, on submission of the issue, nor does any other section of the code relating to replevin. But, by virtue of section 5204, a jury may, "with the assent of the court," be waived. If a jury is waived, the court, in assessing damages for defendant, must make the same finding that the jury is required to by section 5826, as to whether the defendant had the right of property, or the right of possession only, at the commencement of the action.¹

¹ Wolf, v. Meyer, 12 Ohio St. 432.

508. *Finding by the court, and judgment for plaintiff.*

[Title.]

And now this cause coming on for hearing, and a jury being waived, was submitted to the court upon the pleadings and evidence. And on consideration thereof, the court find on the issue joined* for the plaintiff, and find that at the commencement of this action the plaintiff was entitled to the possession of the goods and chattels described in the petition, and that the defendant unlawfully detained the same, and do assess damages to the plaintiff by reason of the premises at \$——.

It is therefore considered by the court that the said plaintiff recover from said defendant the said sum of \$——, together with his costs herein expended.

509. *Finding by the court and judgment for defendant.*

[Title.]

As in last to *, and continue:]—for the defendant, and that at the commencement of this action the defendant [had the right of property in, and] was entitled to the immediate possession of, the goods and chattels in the petition described; and do assess his damages by reason of the premises at \$——.

It is therefore considered by the court that the defendant recover from the plaintiff the said sum of \$——, together with his costs herein expended.

510. (Sec. 5825.) *Verdict of jury, on submission.*

[Title.]

Use regular forms under Subdivision 2, p. 55, ante. The verdict will be in the form of one of those given on pages 279 and 280.

512. (Sec. 5825.) *Judgment on the verdict.*

[Title.]

If no motion for new trial is made, use Entry No. 249; if motion is made and overruled, use No. 252; and in case of heir-looms, add:]—

And it is further ordered that the sheriff deliver over to

— the property heretofore taken by him and retained as an heirloom.

514. *Judgment on verdict in part for each.*¹

[*Title.*]

The jury heretofore impaneled and sworn herein having rendered their verdict for the plaintiff in the sum of forty dollars, and for the defendant in the sum of twenty dollars:

It is therefore considered by the court that the plaintiff recover from the defendant, C. D., the said sum of forty dollars, together with his costs in that behalf expended; and that the defendant recover from the plaintiff, A. B., the said sum of twenty dollars, together with his costs in that behalf expended.

FORMS OF VERDICTS IN REPLEVIN.

I. Verdict for plaintiff.

“We, the jury, find that at the commencement of this action the plaintiff was entitled to the possession of the property described in the petition, and that the defendant unlawfully detained the same; and we do assess the damages of the plaintiff against the defendant, by reason of the premises, at \$——.”

II. Verdict finding right of property in defendant.

“We, the jury, find that at the commencement of this action the defendant had the right * of property in the goods and chattels in the petition described, and was entitled to the possession thereof; and we do assess his damages against the plaintiff, by reason of the premises, at —— dollars.”

III. Verdict finding right of possession in defendant.

“We, the jury, find that at the commencement of this action the defendant had the right of possession in and to the goods and chattels in the petition described; and we do as-

¹In replevin for several articles, where the jury find for the plaintiff as to part of them, and for the defendant as to part, assessing to each the proper damages, separate judgments will be entered for each, with full costs. *Clark v. Keith*, 9 Ohio, 72.

sess his damages against the plaintiff, by reason of the premises, at — dollars.”

IV. Verdict finding that defendant had neither right of property nor possession.

“We, the jury, find that at the commencement of this action the defendant had neither the right of property nor right of possession in the goods and chattels in the petition described.”

V. Verdict finding in part for plaintiff and in part for defendant.¹

“We, the jury, find that at the commencement of this action the plaintiff had the right of possession in, and to, the following of the goods and chattels in the petition described; to wit [*specifically describe*]; and that the defendant unlawfully detained the same; and we do assess his damages therefor at forty-five dollars. And we do further find that at the commencement of this action the defendant had the right of property in, and was entitled to, the possession of [*or, had the right of possession in*] the balance of said goods and chattels, and we do assess his damages therefor at — dollars.”

SECOND. PROCEEDINGS WHEN THE PROPERTY HAS NOT BEEN TAKEN,
OR HAS BEEN RETURNED TO THE DEFENDANT.

Section 5827 of the code provides that, in the above cases, the action may proceed as one for damages only, and that the plaintiff shall be entitled to such damages as are right and proper.

If the property be taken by the plaintiff, and returned to the defendant for want of the undertaking required by section 5819, the judgment entry should require the plaintiff to pay all costs made by taking the same, although he otherwise recover costs from the defendant.²

Use the ordinary forms of entering verdict, p. 55 *et seq.*, and of JUDGMENT ON VERDICT, p. 133 *et seq.*

¹ Clark v. Keith, 9 Ohio, 72.

² Sec. 5827.

CHAPTER XII.

SURETIES—RIGHTS AND REMEDIES OF.

515. (Sec. 5419.) *Addendum certifying suretyship.*

516. (Sec. 5833.) *Judgment in favor of surety for plaintiff's failing to prosecute principal.*

Sec. 5419 provides for certifying, in entering a judgment against principal and surety, which of the defendants is principal debtor and which surety; when, at the time of taking judgment, "it shall be made to appear to the court by parol or other testimony," that one or more of such defendants is surety or bail for his or their co-defendants, and judgment in that form asked.

When such finding is made, enter the judgment in the usual form, and add:

515. (Sec. 5419.) *Addendum certifying suretyship:*

[*Title.*]

And it being made to appear to the court that the defendant, E. F., signed the note [*or, other instrument of writing*] here sued on as surety [*or, bail*] for his co-defendant, the court find that C. D. is principal debtor, and E. F. surety [*or, bail*], in the above judgment; and it is ordered that execution issue accordingly.

516. (Sec. 5833.) *Judgment in favor of surety for plaintiff's failing to prosecute principal.*

[*Title.*]

After entering judgment against the principal in the usual form, continue:

And it being shown to the court by the defendant, E. F., that he was surety for his co-defendant, C. D., and that he heretofore, to wit, on the — day of —, 18—, gave notice in writing to the plaintiff herein to commence an action against the defendant, C. D., the principal debtor herein, which the said plaintiff failed to do within a reasonable time thereafter [*or, specify other neglect*]; it is therefore considered

¹ For a judgment entered in this way, see *Gatch v. Simpkins*, 25 Ohio St. 89.

by the court that the defendant, E. F., go hence without day and recover from the plaintiff his costs herein expended.

CHAPTER XIII.

TAXES AND ASSESSMENTS—RELIEF AGAINST ILLEGAL.

517. (Sec. 5848.) Final decree enjoining illegal levy.

518. (Sec. 5848.) Final decree enjoining collection of illegal taxes.

519. (Sec. 5848.) Judgment for recovery of taxes illegally assessed.

517. Sec. 5848.) *Final decree enjoining illegal levy.*

[*Title.*]

Use Finding III., page 99; or if by default, Finding IV., page 100, and continue:]

And the court further find that the levy of the taxes [*or, assessment*] on the property of the plaintiff, as complained of in the petition, is illegal, and that the plaintiff is entitled to the relief prayed for.

It is therefore ordered and decreed that the levy of the taxes [*or, assessment*] for the use of the defendant, —, on the property of the plaintiff, as complained of in the said petition, be, and the same hereby is, forever enjoined.

[*Add such order as to costs as court shall make.*]

558. (Sec. 5848.) *Final decree enjoining collection of illegal taxes.*

[*Title.*]

Finding III., page 99; or if by default, use Finding IV., page 100, and continue:]

And the court further find that the levy of the taxes [*or, assessment*] on the property of the plaintiff, as complained of in the petition, is illegal, and that the plaintiff is entitled to the relief prayed for.

It is therefore ordered and decreed that the defendant be, and hereby is, forever enjoined from collecting from the plaintiff the taxes [*or, assessment*] complained of in the petition.

[*Add order of the court as to costs.*]

519. (Sec. 5848.) *Judgment for recovery of taxes illegally assessed.*

[*Title.*]

Finding III., page 99 ; or if by default, Finding IV., page 100, and continue:]

The court further find that the tax complained of in the petition was collected by the defendant, C. D., under an illegal assessment, and that the plaintiff is entitled to recover the money so collected from him, with interest thereon from the date of payment; and that there is due to him, by reason of the premises, the sum of \$——.

It is therefore considered that the plaintiff, A. B., recover from the defendants the said sum of —— dollars, together with his costs herein expended, taxed at \$—— [*or other order as to costs*]. And the county auditor is hereby authorized and directed to issue his warrant on the county treasurer for the amount so found due.¹

CHAPTER XIV.

TO CHANGE NAME.

520. (Sec. 5853.) Decree changing name of person.

521. (Sec. 5854.) Decree changing name of town.

522. (Sec. 5855.) Decree changing name of incorporated company.

520. (Sec. 5853.) *Decree changing name of a person.*

[*Title.*]

Now came the petitioner herein, by his attorney, and thereupon his said petition came on to be heard. And the court being satisfied by proof in open court of the truth of the facts set forth in the petition, and that there exists proper and reasonable cause for changing the name of the petitioner, and that due notice of the intended application in said petition was given by publication in the Cincinnati Daily Ga-

¹ By section 1024.

zette, a newspaper in general circulation in this county, thirty days before the filing of the said petition :

It is therefore ordered and decreed by the court that the name of this petitioner, A. B., be, and the same hereby is, changed to —, as prayed for in said petition.

It is further ordered that the petitioner pay the costs herein within — days, or that execution issue therefor.

521. (Sec. 5854.) *Decree changing name of town, etc.*

[*Title.*]

Now came the petitioners herein, by their attorney, and thereupon their said petition came on to be heard. And the court being satisfied that the prayer of the petition is just and reasonable, and that due notice of the intended application therein was given by publication in the Cincinnati Daily Enquirer, a newspaper of general circulation in this county, for thirty days before the filing of said petition, and that three-fourths of the inhabitants of the said town, represented by the said petitioners, desire the change of name in the petition prayed for, and that there is no other town or village or hamlet in this state with the same name as the one herein prayed for.

It is therefore ordered and decreed that the name of the said town of — be, and the same hereby is, changed to —, as prayed for in said petition.

It is further ordered that the petitioners herein pay the costs of this proceeding within — days, or that execution issue therefor.

522. (Sec. 5855.) *Decree changing name of an incorporated company.*

[*Title.*]

Now came the directors of the Buckeye Cannel Coal Company, an incorporated company within this state, by their attorney, and thereupon their said petition came on to be heard. And upon good cause shown, and it appearing to the court that due notice of the object and prayer of said petition was given by publication in the Cincinnati Daily Commercial,

a newspaper of general circulation in this county, thirty days before the filing of the said petition :

It is therefore ordered and decreed by the court that the name of the said company be, and it hereby is, changed to —, as prayed for in said petition.

It is further ordered that the petitioner pay the costs herein within — days, or that execution issue therefor.

CHAPTER XV.

TO CONTEST WILL.

523. (Sec. 5861.) Order for making up issue for jury, etc.

524. (Sec. 5861.) Verdict of the jury entered.

525. (Sec. 5861.) Judgment on the verdict.

It is error for the court to proceed by mere decree, and without the intervention of a jury to set aside a will.¹

523. (Sec. 5861.) *Order making up issue for jury when no issue is made by the pleadings.*

[*Title.*]

It appearing to the court that the plaintiff in this case seeks to set aside a certain paper writing purporting to be the last will and testament of T. G., late of the county of F., deceased, which has been admitted to probate, according to the statute in such cases made and provided, and no issue being made up by the pleadings, it is now ordered that the validity of said will be, and it hereby is, put in issue between the parties, and that it be ascertained by the verdict of the jury whether said writing is the last will and testament of said T. G. or not.²

¹ *Holt v. Lamb*, 17 Ohio St. 374; *Walker v. Walker*, 14 Ohio St. 157.

² See *Green v. Green*, 5 Ohio, 279, for an issue out of chancery.

524. (Sec. 5861.) *Verdict of the jury entered.*[*Title.*]

Use the regular forms, ante, p. 55 et seq., and let the verdict be:]

“We, the jury, on the issue joined, find that the paper writing here shown to us and admitted to probate in the Probate Court of — county, State of Ohio, on the — day of —, 18—, purporting to be the last will and testament and codicil of C. J., deceased, is [*or, is not*] the valid last will and testament and codicil of the said C. J., deceased.”

525. (Sec. 5861.) *Judgment on verdict.*[*Title.*]

The jury in this action having, on a former day of this term, rendered a verdict for the —, and no motion for a new trial having been made:

It is therefore, in accordance with said verdict, adjudged by the court that the paper writing produced in this case, and offered in evidence, purporting to be the last will and testament and codicil of the said C. J., deceased, is [*or, is not*] his valid last will and testament and codicil.

[*Add any order as to costs.*]

CHAPTER XVI.

TO CURE CERTAIN DEFECTS, ERRORS, AND OMISSIONS.

528. (Sec. 5871.) *Decree correcting error in a written instrument, which is not in conformity to law.*[*Title.*]

Now came the petitioner herein, by his attorney, and thereupon his petition came on to be heard, and due legal notice of

the application herein having been given [*or, in other cases, all parties interested being before the court*], the court, on the petition and evidence, find that there has been an error [*or, omission; or, defect*] inadvertently made in [*specify the instrument of writing*], as set forth in said petition, whereby said [*name instrument*] is not in strict conformity with the laws of the state, and good cause being shown why an order correcting said error should be made, the same is hereby allowed, and the said [*written instrument*] is corrected as follows: [*specify*], which the court finds to have been the true and manifest intention of the parties.

It is accordingly ordered and adjudged that, upon the filing of this order, as required by law, the said [*written instrument*] have full force and effect, as if no such error [*or, omission; or, defect*] had ever existed.

And it is ordered that the — pay the costs of this proceeding, and execution is awarded.

CHAPTER XVII.

TO PERPETUATE TESTIMONY.

529. (Sec. 5875.) Order allowing examination of witnesses.

530. (Sec. 5878.) Final order of approval.

529. (Sec. 5875.) *Order allowing examination of witnesses.*

[*Title.*]

Now comes the said A. B., by his attorney, and thereupon his petition for the examination of certain witnesses coming on to be heard, the court, on consideration of the premises, grant the prayer of the same, and allow the examination of the said M. P., L. T., and C. G., witnesses as aforesaid, upon the written interrogatories in the petition set forth; and order that the same be had at the office of —, on the — day of —, commencing at 10 o'clock A. M. [before G. K., Esq., who is hereby specially authorized to make the

same];¹ and that said deposition, when so taken, be returned to the office of the clerk of this court.

† It is further ordered that all parties interested have — days' notice of such time and place served personally upon them.

Or say, by virtue of section 5876 :]

† And it appearing that the parties interested can not be personally notified of said examination, the court hereby appoint C. G., an attorney of this court, on their behalf, to examine the petition, and prepare and file cross-interrogatories to those contained therein, on which the said witnesses shall also be examined.

530. (Sec. 5878.) *Final order of approval.*

[*Title.*]

Now comes the petitioner herein, by his attorney, and the depositions heretofore ordered being produced to the court, and the court being satisfied that the same have been properly taken, as in said order required, and according to law, do approve the same, and order said depositions to be filed with the clerk of this court.

And the court allow a fee of — dollars to C. G., Esq., for his services herein, to be taxed with the costs of this case. For all of which costs execution against the petitioner is awarded.

CHAPTER XIX.

WRECKMASTERS.

531. (Sec. 5895.) *Order appointing commissioner of wrecks.*

532. (Sec. 5896.) *Order laying off districts in county.*

531. (Sec. 5895.) *Order appointing commissioner of wrecks.*

In the matter of the appointment }
of A. B. as commissioner of }
wrecks.

It is hereby ordered by the court that A. B. be, and he

¹ See sec. 5877. If to be taken before a regular officer authorized to take depositions, this order need not be inserted.

is, appointed commissioner of wrecks for the county of —
[or, for district No. — of the county of —], for the term
of — years. And that his bond be fixed at \$—.

And now comes the said A. B., and is duly sworn, and
gives bond as aforesaid to the State of Ohio, with G. H. and
L. M. as sureties to the approval of the court.

532. (Sec. 5896.) *Order laying off districts in county.*

In the matter of laying off wreck }
districts in — county. }

It is hereby, for good cause, ordered by the court that the
county of — be, and it hereby is, divided into — wreck
districts, as follows, to wit: One district is hereby laid off
[specify boundaries], which said district shall be designated and
known as district No. 1. One district is hereby laid off
[specify boundaries], which said district shall be designated and
known as District No. 2, etc.

TITLE II.

PROCEDURE IN PROBATE COURT.

CHAP. I. WILLS.

II. EXECUTORS AND ADMINISTRATORS.

III. GUARDIANS AND TRUSTEES.

IV. INSOLVENT DEBTORS.

VII. GENERAL PROVISIONS.

VIII. APPROPRIATION OF PROPERTY.

CHAPTER I.

WILLS.

- 533. (Sec. 5921.) Citation for production of will.
- 534. (Sec. 5921.) Order for warrant or attachment, in first instance.
- 535. (Sec. 5921.) Order for warrant or attachment when citation is disobeyed.
- 536. (Sec. 5924.) Will produced in obedience to citation, or on attachment.
- 537. (Sec. 5924.) Order for imprisonment of person refusing to produce will.
- 538. (Sec. 5924.) Will produced and prisoner discharged.
- 539. (Sec. 5926.) Testimony of one witness taken on will being presented for probate.
- 539a. (Sec. 5927.) Testimony taken as to signature of witness, in case of death, etc.
- 540. (Sec. 5928.) Commission to take testimony of witness.
- 541. (Sec. 5928.) Same—after one witness sworn.
- 542. (Sec. 5929.) Will admitted to probate.
- 543. (Sec. 5929.) Will admitted to probate when last witness comes.
- 544. (Sec. 5929.) Will admitted to probate when commission is returned, other witness having been previously examined.
- 545. (Sec. 5929.) Commission to examine witness returned, other witness examined and will admitted to probate.
- 546. (Sec. 5932.) Authenticated copy of will from another county of Ohio admitted to record.
- 547. (Sec. 5934.) Refusal to admit will to probate.
- 548. (Sec. 5934.) Notice of appeal from order refusing.

549. (Sec. 5937.) Authenticated copy of will from another state admitted to record.
 550. (Sec. 5937.) Order that copy, etc., be filed and recorded.
 550a. (Sec. 5939.) Publication ordered, on foreign will being presented, and case continued.
 551. (Secs. 5940.) Foreign will admitted to record.

SPOILIATED WILLS—

552. (Secs. 5944-8.) Spoliated will admitted to probate.
 553. (Sec. 5949.) Authenticated copies admitted to record—when record of will destroyed
 554. (Sec. 5963.) Citation for widow issued.

ELECTION OF WIDOW—

555. (Sec. 5964.) Election of widow to take under will.
 556. (Sec. 5964.) Election of widow not to take under will.
 557. (Sec. 5965.) Commission issued to take election.
 558. (Sec. 5965.) Entry on return made by commissioner.
 559. (Sec. 5966.) When widow unable to make election, etc.
 560. (Sec. 5966.) Election for insane or imbecile widow entered by the court.

TESTAMENTARY TRUSTEES—

561. (Sec. 5981.) Letters of trusteeship under will.
 562. (Sec. 5983.) New trustee appointed.
 563. (Sec. 5988.) Trustee of foreign will authorized to execute trust, etc.
 564. (Sec. 5989.) Trustee appointed by a foreign court authorized to execute trust, etc.
 565. (Sec. 5990.) Trustee under foreign will appointed.
 533. (Sec. 5921.) *Citation for production of will.*
 [Title.]

It being represented to the court by W. R., executor of N. R., deceased [*or by any other interested person*], that the last will of the said N. R. is in the custody of one C. S., who has failed to produce it to this court, * it is now therefore ordered, on motion of the said W. R., that a citation issue to said C. S. for him to produce said will, if in his custody, before this court at once for the purpose of its being proved, or to show cause on the — day of —, 18—, at — o'clock, before this court, why he fails to do so.

534. (Sec. 5921.) *Order for warrant or attachment in first instance.*

[Title.]

*As in last to *, and continue:]*—and it further appearing

from the affidavit of the said W. R. [*or otherwise*] that [*state cause of arrest*], it is ordered that a warrant [*or, attachment*] issue to the sheriff of this county [*or of any other in the state*], commanding him to arrest the said C. S., and bring him before this court, on the — day of —, 18—, at 10 o'clock A. M., to show cause why said will has not been produced for the purpose of being proved.

535. (Sec. 5921.) *Order for warrant or attachment when citation is disobeyed.*

[*Title.*]

The said C. S. having been duly served with the citation heretofore issued by this court, and having failed to obey the command thereof, it is ordered that a warrant [*or, attachment*] issue to the sheriff of this county, commanding him to arrest the said C. S., and bring him before this court on the — day of —, 18—, at 10 o'clock A. M., to answer for this his said refusal and neglect, and to show cause as required in the citation.

536. (Sec. 5924.) *Will produced in obedience to citation, or on attachment.*

[*Title.*]

This day came the said C. S., in obedience to the citation issued for him [*or, in custody of the sheriff*], and produced the will of the said N. R. for probate, and thereupon he was discharged from further answering in this proceeding.

537. (Sec. 5924.) *Order for imprisonment of person refusing to produce will.*

[*Title.*]

This day came the said C. S., in obedience to the citation issued for him [*or, in custody of the sheriff*], and was examined concerning his refusal to produce the will of the said N. R. for probate, and after full consideration the court find that he has been, and still is, guilty of so refusing without reasonable cause; and therefore it is ordered that the said C. S. be committed to the jail of this county, there to be kept in close custody until he shall produce said will.

538. (Sec. 5924.) *Will produced, and prisoner discharged.*

[*Title.*]

This day came the said C. S., in custody of the sheriff and produced the will of the said N. R., deceased, to this court for probate, and was thereupon discharged from imprisonment.

539. (Sec. 5926.) *Testimony of one witness taken on will being presented for probate.*

[*Title.*]

The last will and testament of L. D., late of this county, deceased, was this day presented to the court for probate and record, and it appearing to the court that the widow [*or, husband*] of said decedent and all the next of kin [*or, that the said decedent died leaving no widow (or, husband) surviving, and that all the next of kin of said decedent*], residents of Ohio, have been duly notified of the presentation of said will for probate,¹ thereupon H. L., one of the subscribing witnesses to said will appeared in open court, and was duly sworn and examined according to law, and his testimony therein was reduced to writing and filed.*

539a. (Sec. 5927.) *Testimony taken as to signature in case of death or absence of witness.*

[*Title.*]

In place of recording the examination of a witness, substitute as follows:—

And it appearing that F. L., one of the subscribing witnesses to said will, is now deceased [*or, has gone to parts unknown, or, has become incompetent to testify*], thereupon H. L. and R. L. appeared in open court, and were duly sworn and examined according to law touching the genuineness of the signature of said F. L., attached to said will, and their testimony thereon was reduced to writing and filed.

540. (Sec. 5928.) *Commission to take testimony of witness.*

[*Title.*]

The last will and testament of L. D., late of this county, deceased, having been presented to the court for probate and record, and it appearing that H. L., one of the sub-

¹ Required by sec. 5719.

scribing witnesses to said will, is a resident of Lexington, Kentucky, and is without the jurisdiction of this court, it is therefore ordered that a commission, with the will annexed, issue herein to R. M., of Lexington, Kentucky, directing him to take the deposition of said subscribing witness, and return the same, duly certified, with all convenient speed to this court.

A similar entry may be made in case the witness is infirm or feeble, and unable to attend court.

541. (Sec. 5928.) *Commission to take testimony of witness after one sworn.*

[*Title.*]

As in Entry No. 539, to the end, and continue:—

And it appearing to the court that M. D., the other subscribing witness to said will, is a resident of Indianapolis, Indiana, and is without the jurisdiction of this court, it is thereupon ordered that a commission, with the will annexed, issue herein to R. M., of Indianapolis, Indiana, directing him to take the testimony of said subscribing witness, and return the same, according to law, with all convenient speed, to this court.

542. (Sec. 5929.) *Will admitted to probate.*

[*Title.*]

The last will and testament of A. T., deceased, late of this county, was this day presented to the court for probate and record, and it appearing to the court that the widow [*or*, husband] of said decedent and all the next of kin [*or*, that the said decedent died leaving his widow [*or*, husband] surviving, and that all of the next of kin of said decedent], residents of Ohio, have been duly notified of the presentation of said will for probate;¹ thereupon J. B. and T. D., subscribing witnesses to said will, appeared in open court, and were duly sworn and examined according to law, and their testimony thereon was reduced to writing and filed.[†]²

And it appearing to the court from the testimony so taken that * the said will was duly executed and attested, and that

¹ Required by sec. 5719.

² By sec. 5926.

at the time of executing the same the testator was of full age and of sound mind and memory, and not under any restraint, the court now admit the said will to probate, and order the same, together with the testimony so taken, to be recorded according to the statute in such cases made and provided.

543. (Sec. 5929.) *Will admitted to probate when last witness comes.*

[*Title.*]

This day came P. B., the other subscribing witness to said will of L. D., deceased, in open court, and was duly sworn and examined according to law, and his testimony therein was reduced to writing and filed.¹

And it appearing to the court from the testimony so taken and from the testimony of the former witness that [*conclude as from * in last entry*].

544. (Sec. 5929.) *Will admitted to probate when commission is returned. (Other witness having been previously examined.)*

[*Title.*]

The commission heretofore issued herein to take the testimony of M. D., one of the subscribing witnesses to the will of said L. D., deceased, was this day returned duly executed, and the same was filed herein.

And it appearing to the court from the examination of the former witness and from the deposition of the said M. D. that [*conclude as from * in Entry No. 542*].

545. (Sec. 5929.) *Commission to examine witness returned, other witness examined, and will admitted to probate.*

[*Title.*]

The commission heretofore issued herein to take the testimony of H. L., one of the subscribing witnesses to the will of said L. D., deceased, was this day returned duly executed. And it appearing to the court that the widow [*or, husband*] of said decedent and [*or, that said decedent died leaving no*

¹ By sec. 5926.

widow (*or*, husband) surviving, and that] all the next of kin, residents of Ohio, have been duly notified of the presentation of said will for probate, thereupon this day came P. B., the other subscribing witness to said will, in open court, and was duly sworn and examined according to law, and his testimony was reduced to writing and filed.

And it appearing to the court from the testimony so taken that [*conclude as from * in Entry No. 542*].

546. (Sec. 5932.) *Authenticated copy of will from another county of Ohio admitted to record.*

[*Title.*]

An authenticated copy of the last will and testament of E. C., late of — county, Ohio, deceased, and of the order of probate of the same, in said county, were this day presented to this court for record. Whereupon the court, finding that certain real estate devised by said will is situated in this county, hereby admits said copies to record, as provided by law in such cases.

547. (Sec. 5934.) *Refusal to admit will to probate.*

[*Title.*]

As in No. 542, to [†], and continue:—

And the testimony of sundry other witnesses being taken, and it appearing from the testimony that at the time of executing said will the testator was not of sound mind and memory, the court refuse to admit said will to probate.

And now comes S. R., and gives notice of his intention to appeal from this decision to the court of common pleas.

Or the notice of appeal may be by a separate entry, as follows:

548. (Sec. 5934.) *Notice of appeal from order refusing.*

[*Title.*]

Now comes S. R., and gives notice of his intention to appeal to the court of common pleas from the decision of the court in refusing to admit to probate the will of L. M., deceased.

Sec. 5935. For the judgment of the common pleas court on appeal, see Entries Nos. 889 and 890.

549. (Sec. 5937.) *Authenticated copy of will from another state admitted to record.*

[*Title.*]

An authenticated copy of the last will and testament of J. M., deceased, late of Dearborn county, Indiana, was this day presented to this court for record; whereupon the court being satisfied on examination that said will was duly executed and proved according to the laws of the State of Indiana, and part of the property by said will devised being situated in this county, said copy is hereby admitted to record in this court, according to law.

550. (Sec. 5937.) *Order that copy of recorded will (executed and proved in another state and recorded as in last entry in one county of Ohio) be filed and recorded.*

[*Title.*]

A paper writing, purporting and claimed to be a copy of the last will and testament of J. M., deceased, late of Dearborn county, Indiana, with a copy of an order to record the same in — county, Ohio, annexed thereto, certified by the probate judge of said county of —, under the seal of his court, were this day presented for record; whereupon, it appearing that part of the property devised by said will is situated in this county, it is ordered that said certified copies of will and order for record be filed and recorded in this court according to law.

550a. (Sec. 5939.) *Publication ordered, on foreign will being presented, and case continued.*

[*Title.*]

This day came R. S., and produced to the court a paper writing, purporting to be the last will and testament of J. R., late of London, England, deceased, and of the probate thereof, and made application for admission of the same to probate in this county; and thereupon it is ordered by the court that publication be made as provided by law, and the motion to admit to record is continued for the term of two months.

551. (Sees. 5940.) *Foreign will admitted to record.*

[*Title.*]

A copy of the will of J. R., deceased, late of London, England, and the probate thereof duly authenticated, having been heretofore presented for record by R. S., the executor under said will, and due notice of such application having been given by publication in the Cincinnati *Daily Gazette*, a public newspaper printed [*or*, of general circulation] in this county, according to law, which publication is hereby approved; and it appearing to the court that said will was executed, proved, and allowed in said city of London, according to the laws of England, that there is an estate in this county upon which said will may operate, and that said instrument ought to be allowed in this state, the court now order that said copy be filed and recorded in this county as provided by law.

Sec. 5941. For entry granting letters [testamentary under any of the wills, admitted as above, modify Entry No. 566. For entry granting letters of administration, with the will annexed, see Entry No. 571.

SPOILIATED WILLS—

552. (Sees. 5944-8.) *Spoiliated will admitted to probate.*

[*Title.*]¹

This day came J. M. W. before this court for the purpose of proving the execution and contents of the last will and testament of S. R., late of Hamilton county, deceased. And it appearing to the court that due notice has been given to all persons interested in said will, who reside in said county of Hamilton, thereupon J. B. and T. D., subscribing witnesses to said will, and also other witnesses, viz., P. M. and D. R., appeared in open court, and were duly sworn and examined touching the execution and contents of said will, and their testimony thereon was reduced to writing and filed.

And the court being satisfied from the testimony so taken that the said S. R. did, on the — day of —, 18—, duly execute his last will and testament, in the mode provided by the law in force at the time of its execution, and that said will was not revoked by said testator, but that it has been lost

[*or*, spoliated, *or*, destroyed] subsequent to the death of said testator, the court finds and does hereby establish the contents of said will to have been, as near as can be ascertained, as follows, to wit [*set out in full*].

And the court further orders that said will and testimony be recorded as in case of other wills admitted to probate.

Sec. 5946. The commission to take testimony may be the same as in other cases. Modify entry No. 540.

If the will was lost after being admitted to probate, but before it was recorded, as provided in sec. 5947, as amended 800 L. 24, the last entry will readily be modified to suit the case.

553. (Sec. 5949.) *Authenticated copies admitted to record, when record of will has been destroyed.*

[*Title.*]

A copy of the last will and testament of J. M., late of — county, deceased, and of the probate thereof, certified under the hand and seal of the probate judge of said county of — to be a true copy of the original will and the probate thereof, was this day presented for record; and, thereupon, it being made to appear to the satisfaction of the court that the record of said original will has been destroyed, the court orders that said copy be recorded in this county according to law.

Sec. 5951. For entry of copy of will alone admitted to record, after record destroyed, use last entry, omitting the words relating to probate of will.

ELECTION OF WIDOW.

554. Sec. 5963; 86 v. 187. *Citation for widow¹ issued.*

[*Title.*]

It is ordered by the court that a citation of issue for C. N., widow of E. N., deceased, late of this county, to appear before this court and make her election whether she will take under the provision of the will of her late husband, or be endowed of the lands of her said husband, and take her distributive share of the personal estate.

555. (Sec. 5964.) *Election of widow¹ to take under will.*

[*Title.*]

This day personally appeared in open court C. N., widow

¹ By amendment of April 3, 1889, 86 v. 187, secs. 5963–5966 inclusive, are made equally applicable to a widower. In which cases modify entries accordingly.

of E. N., deceased, and made known therein her election to take under the provision of the will of her said deceased husband. Whereupon the court explained to her the provision of said will and her rights under it, also her rights under the law, and she declared herself satisfied with the provisions of said will, and asked that her election to take under said will might be entered upon the journal of the court, which is accordingly done.

556. (Sec. 5964.) *Election of widow¹ not to take under will.*
[Title.]

This day personally appeared in open court C. N., widow of E. N., deceased, and after the court had explained to her the provisions of the will of her said deceased husband and her rights under it, also her rights under the law, made known her election not to take under said will.

The last entry is not absolutely necessary, as a failure to elect to take under the will is construed to be an election not so to take.

557. (Sec. 5965.) *Commission issued to take election of widow,¹ etc.*

[Title.]

On application made in behalf of C. N., widow of E. N., deceased, and it appearing that she is by reason of ill-health [*or*, not being a resident of this county] unable to appear in court, it is ordered that a commission, with a copy of the will annexed, be issued, directed to W. C., to take the election of said widow to accept the provisions of the will of her said deceased husband, and to explain to her her rights under the will and by law.

And the said W. C. is directed to return his proceedings to this court.

558. (Sec. 5965.) *Entry on return made by commissioner.*
[Title.]

The commission to take the election of C. N., widow¹ of E. N., deceased, under the will of her said husband, deceased, was this day duly executed and filed. And by said return it is shown that the said widow elects to take under the said will.

¹ Same provision relates also to widower. See note, p. 299.

559. (Sec. 5966.) *When widow¹ is unable to make an election, person appointed to ascertain value of provision made by will.*

[*Title.*]

It appearing to the court that C. N., widow of E. N., deceased, late of this county, is unable to make an election under the will of her said husband, deceased, by reason of her insanity [*or*, imbecility of mind], J. H. is hereby appointed by the court to ascertain the value of the provision made by the said E. N. in his will for the said C. N., and also the value of her rights by law in the estate of the said E. N., and to report the same to this court.

560. (Sec. 5966.) *Election for insane or imbecile widow¹ entered by the court.*

[*Title.*]

The report of J. H., having been filed, showing the value of the provision made by E. N., deceased, in his will for C. N., his widow, and also the value of her interest by law in the estate of the said E. N., deceased, the court, being satisfied that the provision of said will is more valuable and better for her than the provision by law, now enters an election for said widow, by virtue of these proceedings, to take under the said will

TESTAMENTARY TRUSTEES—

561. (Sec. 5981.) *Letters of trusteeship under will.*

[*Title.*]

On application, the court grants unto R. C. letters of trusteeship under the will of E. S., deceased, he being named as such trustee in the will of said decedent. Whereupon * the said R. C. now accepts said appointment, and files a statement of the whole estate of said trust created by said will, and presents his bond as such trustee in the sum of — dollars, with R. D. B. and J. W. D. as sureties, which bond is approved by the court.

562. Sec. 5983.) *New trustee appointed.*

[*Title.*]

R. C., the trustee named in the will of C. S., deceased,

¹ See note, p. 299.

having failed to qualify as such, the court now appoints W. B. as such trustee. Whereupon [*conclude as from * in last entry*].

Sec. 5986. Make entry similar to last.

563. (Sec. 5988.) *Trustee of foreign will authorized to execute trust, etc.*

[*Title.*]

Modify Entry No. 561.

564. (Sec. 5989.) *Trustee appointed by a foreign court authorized to execute trust, etc.*

[*Title.*]

This day came W. H., and presented to the court an authenticated record of his appointment as trustee under the will of D. F., late of Paris, France, by the — court in said city, and thereupon, the court being satisfied that said appointment was duly made, and that certain lands affected by said will are situated in this county, grants unto the said W. H. letters of trusteeship, under the said will, for the execution of the trust named in said appointment. And thereupon the said W. H. presents his bond as such trustee in the sum of \$——, with R. D. and W. C. as sureties, which is approved by the court.

565. (Sec. 5990.) *Trustee under foreign will appointed.*

[*Title.*]

And now the petition herein coming on to be heard, and the court finding that by the will of the said C. T., duly executed and proved according to the laws of England, and admitted to record in this state, a trust is created concerning certain lands situated in this county, W. C. B. is hereby appointed trustee under said will to carry into effect the said trust.

And thereupon the said W. C. B. enters into an undertaking as such trustee, with R. D. and B. D. as sureties, which is approved by the court.

CHAPTER II.

EXECUTORS AND ADMINISTRATORS.

- 566. (Sees. 5994, 5.) Letters testamentary granted.
- 567. (Sees. 5994, 5.) Letters of administration granted to widow or next of kin.
- 568. (Sees. 5994, 5.) Letters granted to other than widow or next of kin.
- 569. (Sec. 5994.) Letters granted on estate of intestate dying out of state.
- 570. (Sec. 6000.) Letters granted when one of two or more named in will declines.
- 571. (Sec. 6000.) Letters of administration, with the will annexed, granted when person named in will as sole executor declines.
- 572. (Sec. 6001.) Administration, with the will annexed, granted during minority of executor.
- 573. (Sec. 6001.) Letters testamentary to one, when other executor is under age.
- 574. (Sec. 6001.) Entry, when executor named in last entry comes of age.
- 575. (Sec. 6007.) Special administrator appointed.
- 576. (Sec. 6011.) Citation against special administrator.
- 577. (Sec. 6011.) Attachment allowed after citation disobeyed.
- 578. (Sec. 6011.) Order committing to jail.
- 579. (Sec. 6013.) Administration of assets, within the state, of non-resident granted.
- 580. (Sec. 6014.) Administration granted after twenty years.
- 581. (Sec. 6015.) Resignation of executor or administrator accepted, and administrator appointed.
- 582. (Sec. 6017.) Executor or administrator removed and new administrator appointed.
- 583. (Sec. 6018.) Letters of administration, *de bonis non*, granted after death of executor or administrator.
- 584. (Sec. 6019.) Administration revoked on a will being subsequently proved, etc.
- 585. (Sec. 6022.) Letters granted after marriage of executrix or administratrix.

THE INVENTORY, THE ALLOWANCE TO THE WIDOW AND CHILDREN, AND THE DEBTS
DUE THE ESTATE—

- 586. (Sec. 6028.) Appraisement dispensed with.
- 587. (Sec. 6028.) Appraisers appointed.
- 588. (Sec. 6040.) Appraisers appointed to set off widow's allowance.
- 589. (Sec. 6043.) Allowance to widow increased.

- 590. (Sec. 6047.) Order for return of inventory.
- 591. (Sec. 6048.) Attachment allowed on failure to return inventory.
- 592. (Sec. 6048.) Order committing to jail until inventory be returned.
- 593. (Sec. 6049.) Letters revoked for failure to return inventory.
- 594. (Sec. 6053.) Citation allowed against person concealing assets.
- 595. (Sec. 6054.) Order committing to jail on refusal to answer, etc.
- 596. (Sec. 6057.) Judgment against person found guilty of concealing assets.
- 597. (Sec. 6061.) Appraisers appointed for property discovered after inventory filed.
- 598. (Sec. 6063.) Time for settlement by executor extended.
- 599. (Sec. 6073.) Order permitting compounding of debt.

SALE OF PERSONAL PROPERTY, AND THE SALE BILL—

- 600. (Sec. 6074.) Appraisement and sale dispensed with.
- 601. (Sec. 6074.) Appraisement and sale subsequently ordered.
- 602. (Sec. 6076.) Order for private sale.
- 603. (Sec. 6076.) Same—at less than appraised value.
- 604. (Sec. 6076.) Public sale directed on failure to sell at private sale.
- 605. (Secs. 6077, 8.) Compounding of desperate claim authorized.
- 606. (Sec. 6077.) Sale of desperate claim at public sale authorized.
- 607. (Sec. 6077.) Private sale of desperate claim ordered.
- 608. (Sec. 6077.) Order that desperate claim be filed, etc.
- 609. Sale of personal property confirmed.

THE NOTICE TO CREDITORS, THE AUTHENTICATION AND PAYMENT OF DEBTS, AND PAYMENT OF LEGACIES—

- 610. (Sec. 6093.) Referees approved of.
- 611. (Sec. 6096.) Report of referees in arbitration confirmed, etc.
- 612. (Sec. 6096.) Judgment against claim on report of referees.
- 613. (Sec. 6096.) Report set aside and new referees appointed.

EXECUTOR'S OR ADMINISTRATOR'S CLAIM AGAINST THE ESTATE HE REPRESENTS—

- 614. (Sec. 6100.) Order that notice of hearing be given.
- 615. (Sec. 6101.) Claim allowed.
- 616. (Sec. 6105.) Execution against executor allowed.
- 617. (Sec. 6107.) Judgment of waste against executor.
- 618. (Sec. 6107.) Same—when amount can not be ascertained.
- 619. (Sec. 6115.) Order for payment of claims on which right of action will not accrue for four years.
- 620. (Sec. 6115.) Order that administrator retain money to pay same.
- 621. (Sec. 6115.) Order that bond be taken by owner of such claim.
- 622. (Sec. 6126.) Allowing notice of appointment of executor to be given.
- 623. (Sec. 6128.) Order to distribute, etc., on bond being given.
- 624. (Sec. 6128.) Same—without bond being required.

FOREIGN EXECUTORS AND ADMINISTRATORS—

625. (Sec. 6131.) Order, on petition, that he render account.
 626. (Sec. 6131.) Order distributing amount found in hands of.

ACTION FOR INJURY BY WRONGFUL DEATH—

627. (Sec. 6135.) Judgment on verdict.
 628. (Sec. 6135.) Order that administrator settle claim.

SALE OF REAL ESTATE FOR PAYMENT OF DEBTS, AND DISTRIBUTION OF PROCEEDS—

629. (Sec. 6146.) Bond approved and order for sale not granted.
 630. (Secs. 6147 and 6153.) Finding sale not necessary.

Where there is no dower to be assigned—

631. (Sec. 6147.) Sale ordered on appraisement in the inventory.
 632. (Sec. 6147.) New appraisement ordered.
 633. (Sec. 6147.) Appraisement ordered in case widow has waived dower by metes and bounds.
 634. (Sec. 6147.) Appraisement confirmed and decree for sale.

Where there is dower to be assigned—

635. (Sec. 6155.) Order for assignment of dower, and appraisement of premises.
 636. (Sec. 6155.) Assignment, by metes and bounds, and appraisement confirmed, and decree for sale.
 637. (Sec. 6155.) Assignment of dower, as of rents, etc., and appraisement confirmed, and decree for sale

In general—

638. (Sec. 6156.) Order substituting appraiser.
 639. (Sec. 6160.) Order directing sale for certain amount.
 640. (Sec. 6160.) Order for new appraisement.

Private sale—

641. (Sec. 6161.) Decree for.
 642. (Sec. 6161.) Order for, after appraisement confirmed.
 643. (Sec. 6161.) Order for, on report of offer made

Confirmation of sale and distribution of proceeds—

644. (Sec. 6162.) Decree for.
 645. (Sec. 6162.) Decree for, after private sale.
 646. (Sec. 6162.) Decree for, where dower by metes and bounds has been waived.

Miscellaneous—

647. (Sec. 6166.) Sale of equitable interest ordered.
 647a. (Sec. 6166.) Sale of equitable interest confirmed, and order of distribution.
 648. (Sec. 6168.) Copy of appointment of foreign executor filed.

THE ACCOUNT AND COMPENSATION OF AN EXECUTOR OR ADMINISTRATOR, AND DISTRIBUTION IN CERTAIN CASES.

- 649. (Sec. 6175.) Account current filed and suspended.
- 650. (Sec. 6175.) Final account filed and suspended.
- 651. Account allowed and confirmed, and order of distribution.
- 652. Suspended account allowed and confirmed.
- 653. Various accounts and vouchers allowed and confirmed.
- 654. Account confirmed on exceptions heard.
- 655. Account disallowed.
- 656. Exceptions withdrawn.
- 657. (Sec. 6186.) Account referred to special commissioner.
- 658. (Sec. 6187.) Order opening settled account.
- 659. (Sec. 6188.) Allowance for expenses and special services.
- 660. (Sec. 6189.) Order for distribution of notes, etc.
- 661. (Sec. 6190.) Account of payments filed and allowed as final discharge.
- 662. (Sec. 6191.) Order for investment of unclaimed money.
- 663. (Sec. 6192.) Order for payment to distributee.
- 664. (Sec. 6195.) Citation issued against executor, etc., failing to pay money.
- 665. (Sec. 6196.) Order for publication against non-resident executor, etc.
- 666. (Sec. 6198.) Amended or supplemental petition allowed, making new parties.
- 667. (Sec. 6198.) Finding and order on submitted question.
- 668. (Sec. 6198.) Same—by agreement.
- 669. (Sec. 6199.) Order reserving case to common pleas court.
- 670. (Sec. 6202.) Judgment construing any matter respecting the estate.

THE ADMINISTRATION BOND; SURETIES IN; SUITS ON—

- 671. (Sec. 6204.) Order releasing surety.
- 672. (Sec. 6204.) Administrator removed for failing to give new bond.
- 673. (Sec. 6205.) Bond insufficient—new one required.
- 674. (Sec. 6208.) Order for bond of indemnity.
- 675. (Sec. 6212.) Leave to bring suit on bond.

PROCEEDINGS WHEN THE ESTATE OF A DECEASED PERSON IS INSOLVENT—

- 676. (Sec. 6224.) Commissioners appointed.
- 677. (Sec. 6226.) Further time allowed to commissioners.
- 678. (Sec. 6230.) Order allowing or disallowing claim on appeal from commissioners.
- 679. (Sec. 6231.) Order, on petition, allowing appeal.
- 680. (Sec. 6232.) Order allowing claim on appeal in last entry.
- 681. (Sec. 6235.) Order of distribution on report of commissioners.
- 682. (Sec. 6236.) Estate declared probably insolvent, etc.
- 683. (Sec. 6243.) Judgment on the award of the referees.
- 684. (Sec. 6243.) Judgment in suit brought under section 6241.
- 685. (Sec. 6244.) Allowance of claim confirmed or set aside, on exceptions heard.

566. (Sec. 5994, 5.) *Letters testamentary granted.*

[Title.]

On application, the court grants unto H. C. letters testamentary under the will of B. H., late of this county, deceased, he being named as executor therein; whereupon he accepts * said appointment, files an estimate of the value of the whole estate,¹ and presents his bond as such executor in the sum of — dollars, with E. H. and G. D. as sureties, to the approval of the court. [Or if no bond is required say: Whereupon he accepts said appointment: no bond required by said will.] And H. B., C. D., and R. M. are appointed appraisers.²

Court may add by sec. 6025]:

And it is ordered that said executor include in the inventory an appraisement of all the real estate of said decedent.

567. (Sec. 5994, 5.) *Letters of administration granted to widow or next of kin.*³

[Title.]

On application, the court grants unto E. T. [widow] letters of administration on the estate of H. T., late of this county, deceased. Thereupon she [or, he] accepts * said appointment, files an estimate of the whole estate of said decedent, and presents her [or, his] bond as such administratrix [or, administrator] in the sum of — dollars, with H. T. and G. H. as sureties, to the approval of the court. And H. B., C. D., and R. M. are appointed appraisers.²

Court may add by sec. 6025]:

And it is ordered that said administratrix [or, administrator] include in the inventory an appraisement of all the real estate of said decedent.

568. (Sec. 5994, 5.) *Letters granted to other than widow or next of kin.*

[Title.]

The widow and next of kin of H. T., late of this county,

¹ This estimate is given to enable the probate judge to fix the amount of the bond. If this entry is used in case of a non-resident decedent, say "of the whole estate to be administered in this county."

² If appointed subsequently, see Entry No. 587.

³ See sec. 6005.

deceased, having declined to take administration of his estate,¹ the court, on application, grants letters of administration on said estate to H. M. Thereupon he accepts [*continue as from * in last*].

Entries in form of last may be made in other cases provided for in sec. 6005.

569. (Sec. 5994.) *Letters granted on estate, within the state, of person dying intestate out of the state.*

[*Title.*]

On application of —, the court grants unto W. P. letters of administration on the estate situated in this county of G. H., late of Madison, Wisconsin, deceased. Whereupon said W. P. accepts said appointment, and files an estimate of the whole estate situated as aforesaid in this county, and presents his bond [*conclude as in No. 567*].

570. (Sec. 6000.) *Letters granted when one, of two or more named in will as executors, declines.*

[*Title.*]

H. D., named in the will of L. M., late of this county, deceased, as one of the executors, not accepting the trust, letters testamentary are, on application, granted to H. C., named in said will as the other of said executors. Whereupon he accepts [*conclude as from * in No. 566*].

571. (Sec. 6000.) *Letters of administration, with the will annexed, granted, when person named in will as sole executor declines.*

[*Title.*]

H. D., named as executor in the will of L. M., late of this county, deceased, not accepting the trust [*or, having failed to give bond as required by law*], letters of administration, with the will annexed, on the estate of the said L. M. are hereby, on application, granted to A. P.

Whereupon he accepts [*conclude as from * in No. 567*].

¹ See sec. 6005.

572. (Sec. 6001.) *Administration, with the will annexed, granted during minority of executor.*

[Title.]

On application, and the executor named in the will of L. M., late of this county, deceased, being under the age of twenty-one years, letters of administration, with the will annexed, on the estate of the said L. M., are hereby granted during the minority of said executor, to A. P.

Whereupon he accepts [*conclude as from * in No. 567*].

573. (Sec. 6001.) *Letters testamentary granted to one, when the other executor named in will is under age.*

[Title.]

H. D., named as one of the executors in the will of L. M., late of this county, deceased, being under age, letters testamentary are, on application, granted to H. C., named in said will as the other executor, during the minority of the said H. D.

Whereupon he accepts [*as from * in No. 566*].

574. (Sec. 6001.) *Entry, when executor named in last entry comes of age.*

[Title.]

H. D., named as one of the executors in the will of L. M., late of this county, deceased, having now come of age, letters testamentary are granted unto him as such executor, with H. C., the other executor named in said will.

Whereupon he accepts [*conclude as from * in No. 566*].

Sec. 6003. For entry granting administration after death of executor, see Entry No. 583.

575. (Sec. 6007.) *Special administrator appointed.*

[Title.]

On application, and good cause being shown therefor, the court hereby appoints J. W. as special administrator of the estate of W. M., late of this county, deceased, to collect and preserve the effects of the decedent until letters testamentary or of administration are granted, and fix his bond at \$——. Whereupon the said J. W. accepts [*as from * in No. 567*].

576. (Sec. 6011.) *Citation against special administrator allowed.*
[*Title.*]

On complaint of the executor of the estate of W. M., a citation is allowed to be issued against J. W., special administrator of said estate, to appear before the court forthwith [*or*, on the — day of —, 18—], to answer concerning his neglect [*or*, refusal] to deliver over to said executor certain property belonging to said estate.

577. (Sec. 6011.) *Attachment allowed after citation disobeyed.*
[*Title.*]

And now, J. W. having failed to appear before this court in answer to its citation heretofore issued and served personally upon him, a writ of attachment is, on motion, allowed to be issued, commanding the sheriff to arrest and bring the said J. W. before this court forthwith [*or*, on the — day of —, 18—], to answer for his disobedience and for his neglect [*or*, refusal] to deliver over to said executor certain property belonging to said estate.

578. (Sec. 6011.) *Order committing to jail.*
[*Title.*]

This day came the said J. W., in response to the citation heretofore issued for him [*or*, in custody of the sheriff], and was examined under oath touching his neglect [*or*, refusal] to deliver over to the executor of the estate of W. M. certain property belonging to said estate: whereupon, after hearing the testimony produced, the court find that the said executor is entitled to said property, viz. [*name*], and that the said J. W. retains the same without reasonable excuse.

It is therefore ordered that the said J. W. be committed to the jail of this county, there to remain until he shall deliver over said property, or be otherwise legally discharged.

Sec. 6011. For judgment in the civil action provided for, use the ordinary forms of the civil code.

579. (Sec. 6013.) *Administration of assets, within the state, of non-resident doing business in the state, granted.*

[*Title.*]

Entry may be made in form as No. 569, modified to suit the case.

580. (Sec. 6014.) *Administration granted after twenty years from death of decedent.*

[*Title.*]

The petition herein coming on this day to be heard, and good cause being shown, and notice having been given of the hearing of this petition, as required by the court, the court grants unto E. T. letters of administration [*conclude as in Entry No. 567*].

581. (Sec. 6015.) *Resignation of executor or administrator accepted and administrator appointed.*

[*Title.*]

This day came W. P., executor of the last will and testament [*or, administrator of the estate*] of A. T., deceased, and offered his resignation of said office, which was accepted by the court.

And thereupon the court grants unto E. T. letters of administration on the said estate, not already administered.

Whereupon the said E. T. accepts [*as from * in No. 567*].

582. (Sec. 6017, 81 O. L. 137.) *Executor or administrator removed and new administrator appointed.*

[*Title.*]

On motion made to the court, and full hearing, the court find that E. T., executor of M. W., deceased, after being cited for that purpose, has neglected to render his accounts according to law and the order of this court [*or state other cause named in section 6017*], it is now therefore ordered that said E. T. be removed from the administration of said estate.

And, on application, the court grants unto A. P. letters of administration [*with the will annexed*] on the estate of the said R. W., deceased, not already administered.

And thereupon the said A. P. accepts [*as from * in No. 567*].

583. (Sec. 6018.) *Letters of administration, de bonis non, granted after death of executor or administrator.*

[*Title.*]

J. S., the executor [*or*, former administrator of the estate] of W. P., having died, the court, on application, grants unto A. P. letters of administration [with the will annexed] on the estate of the said W. P., not already administered by the former executor [*or*, administrator].

Whereupon the said A. P. accepts [*as from * in No. 567*].

584. (Sec. 6019.) *Administration revoked on a will being subsequently proved, and letters testamentary granted.*

[*Title.*]

A will of L. M., late of this county, deceased, having been duly proved and allowed since letters of administration were granted to E. T. upon his estate, as intestate, said letters of administration are hereby revoked. And, on application, letters testamentary are granted unto H. C. under the said will.

Whereupon the said H. C. accepts [*continue as from * in No. 566*].

And it is ordered that E. T. deliver possession to the said H. C. of all the personal effects and assets of said estate.

585. (Sec. 6022.) *Letters granted after marriage of executrix or administratrix.*

[*Title.*]

Modify Entry No. 583.

THE INVENTORY, THE ALLOWANCE TO THE WIDOW AND CHILDREN,
AND THE DEBTS DUE TO THE ESTATE—

586. (Sec. 6028.) *Appraisement dispensed with.*

[*Title.*]

For good cause shown, an appraisement of the estate of the decedent herein is dispensed with.

587. (Sec. 6028.) *Appraisers appointed.*¹

[*Title.*]

The court hereby appoint G. H., A. T., and W. C., three suitable disinterested persons, to appraise the estate of H. C., deceased.

Sec. 6040. If no appraisers are appointed to appraise the personal property, the court will appoint special ones to set off the widow's allowance, as follows:

588. (Sec. 6040.) *Appraisers appointed to set off widow's allowance.*

[*Title.*]

This cause being heard this day, upon the petition of C. P., widow of said J. P., deceased, for a first year's allowance, and it appearing to the court that heretofore no appraisers of the personal property of the said decedent have been appointed, and no allowance made to the said widow, it is ordered that F. D., G. S., and E. D. be, and they are hereby, appointed as appraisers to set off to said widow a sufficient amount in property or money for her support for one year from the time of the death of said decedent.

589. (Sec. 6043.) *Allowance to widow increased.*

[*Title.*]

This cause coming on to be heard on the petition of the widow, C. N., to review the allowance made to her by the appraisers of the estate, and for an increase of the amount, the court, being fully advised, find upon the testimony offered by the parties interested that said allowance should be increased. Wherefore it is ordered and adjudged that said allowance as fixed by the appraisers be, and it hereby is, set aside. And the court find that the sum of — dollars is necessary for the support of said widow, and do fix her year's allowance at said sum, and order the same paid to her, or her attorney, by the administrator, from and out of the first moneys of the estate coming into his hands, without unnecessary delay.

¹ If appointed at the time letters are granted, see Entries Nos. 566 and 567.

A similar entry may be made for diminishing the allowance.

590. (Sec. 6047.) *Order for return of inventory, etc.*

[*Title.*]

On motion to the court by —, and it appearing that E. T., the executor of the above-named decedent, has failed to return an inventory of the estate within the time required by law, it is ordered that he return the same on or before the — day of —, 18—, or show cause before this court on that day why an attachment should not be issued against him.

591. (6048.) *Attachment allowed on failure to return inventory.¹*

[*Title.*]

And now E. T., the executor of the above-named decedent, having failed to return an inventory thereof, or show good cause why he has not done so, according to the former order of this court, served personally upon him, an attachment is, on motion, allowed to be issued, commanding the sheriff to arrest and bring the said E. T. before this court forthwith [*or, on the — day of —, 18—*], to answer for his disobedience, and for his failure to return such inventory.

593. (Sec. 6049.) *Letters revoked, and administration granted to another, for failure to return inventory.*

[*Title.*]

E. T., the executor of the above named estate, having absconded [*or, concealed himself*], so that the former order of this court could not be served personally on him [*or, having*

¹By 81 O. L. 137, sec. 6048 is repealed; but as sec. 6047 still authorizes the court to require the executor to show cause why an attachment should not issue it seems likely that on failure to show cause the attachment should be issued, and this form is therefore retained.

failed to file an inventory as required by law and the former order of this court], his letters testamentary are hereby revoked. And, on application, letters of administration on the estate of the said E. C., deceased, not yet administered, are granted to M. W.

Thereupon the said M. W. presented his bond [*continue as from * in No. 567*].

And it is ordered that E. T. deliver possession to the said M. W. of all the personal effects and assets of the said estate.

594. (Sec. 6053.) *Citation allowed against person concealing assets.*

[*Title.*]

On complaint of the administrator of the above-named estate [*or other interested party*], a citation is allowed to be issued against J. W., to appear before this court forthwith [*or, on the — day of —*], to be examined touching his alleged concealment [*or, embezzlement*] of certain effects of the said decedent, to wit [*describe as specifically as can be done*].

If the citation is disobeyed, an attachment may be ordered, as in No. 577.

595. (Sec. 6054.) *Order committing to jail, on refusal to answer, etc.*

[*Title.*]

This day J. W. came before the court, upon citation heretofore issued [*or, in custody of the sheriff*], and the following interrogatories were lawfully propounded to him, touching the charge against him, viz. [*state interrogatories*]. And the said J. W. refused to answer the same. Thereupon it is adjudged by the court that the said J. W. be committed to the jail of this county, there to remain in close custody until he shall submit to answer, or be otherwise legally discharged.

596. (Sec. 6057.) *Judgment against person found guilty of concealing assets.*

[*Title.*]

Upon complaint of the administrator of the above-named

estate [*or other interested party*], and after full examination, the court find that J. W. is guilty, as accused, of having concealed [*or, embezzled, or, conveyed away*] certain moneys [*or, effects*] belonging to the estate of the said R. M., deceased, to wit [*name property*] of the value of \$——.

It is therefore considered and adjudged that E. T., the administrator as aforesaid [*or, if there is no executor or administrator, the State of Ohio, for the use of said estate*], recover from the said J. W. the said sum of \$——, together with ten per cent penalty thereon, and also the costs of this prosecution.

Entries similar to the last three may be made in other cases under secs. 6053–7.

597. (Sec. 6061.) *Appraisers appointed for property discovered after inventory filed.*

[*Title.*]

It appearing to the court that the administrator herein has become aware of certain personal property belonging to the estate of J. R., deceased, unknown to the administrator at the time of the filing of the inventory of said estate, the court appoint G. H., A. T., and R. H., three suitable disinterested persons, to appraise such personal estate.

Sec. 6061. For order for return of inventory, see Entry No. 590.

598. (Sec. 6063.) *Time for settlement by executor extended.*

[*Title.*]

On motion and affidavit of E. T., the executor of the decedent above named, and the court being satisfied that it is necessary, the time for said executor to collect the assets of said estate is extended —— months from this date.

599. (Sec. 6073.) *Order permitting compounding of debt.*

[*Title.*]

Upon motion of E. T., executor of C. D., deceased, to compound the claim against R. S., and it appearing to the court that said R. S. is unable to pay his debts in full, said executor is authorized to give a discharge of the debt aforesaid upon receiving thereon the sum of \$——.

SALE OF PERSONAL PROPERTY, AND THE SALE BILL—

600. (Sec. 6074.) *Appraisement and sale dispensed with.*

[*Title.*]

The testator having expressed in his will a desire that no appraisement or sale of the assets of the above-named estate be made, they are hereby dispensed with.

601. (Sec. 6074.) *Appraisement and sale subsequently ordered*

[*Title.*]

On application of T. B., one of the creditors of the above-named estate, and it appearing that a sale of the assets of said estate is necessary for the payment of debts, it is now ordered, for good cause shown, that an appraisement and sale thereof be made by the executor, as though they had not been dispensed with, and H. B., C. D. and R. M. are appointed appraisers herein. [*Directions for public or private sale, as in entries following, may be added here.*]

602. (Sec. 6076.) *Order for private sale of personal property.*

[*Title.*]

On motion and affidavit filed, and for good cause shown, H. B., administrator of the estate of W. C., deceased, is authorized to sell [within — months], for cash [*or otherwise, on such terms as the court may direct*],¹ at private sale the personal property designated in said motion, at not less than the appraised value thereof.

603. (Sec. 6076.) *Same, at less than than appraised value.*

[*Title.*]

The administrator of the estate of L. P., deceased, is, on motion, hereby authorized to sell at private sale, for cash [*or specify other terms of sale*],¹ the shares of stock² of the C. P. Railroad belonging to the said estate. And the court being satisfied, by the affidavits of E. G., F. H., and W. T., that said property can not be sold at its appraised value, and that it will be for the best interest of the estate to sell the same at a less price, the administrator is authorized so to sell it.

¹ See sec. 6081.

² See sec. 6080.

but not at less than the market value. [*Or the court may name the price.*]¹

For an order that personal property be sold in the regular course of trade, modify Entry No. 750.

604. (Sec. 6076). *Public sale directed, on failure to sell at private sale.*

[*Title.*]

Private sale of the personal property of the above-named estate not having been effected, it is now ordered that the same be sold at public sale as though private sale had not been ordered.

605. (Sec. 6077-8.) *Compounding of desperate claim authorized.*
[*Title.*]

On motion of D. G., executor of the above-named decedent, and due notice thereof being given, and proof being made by him that the claim against J. K. is desperate, on account of [*specify cause named in this section*] the executor is authorized * to compound the same by taking in cash \$—,² and taking the individual notes of J. K. for the balance, payable [*specify*] in full satisfaction of said claim.

606. (Sec. 6077.) *Sale of desperate claim at public sale authorized.*
[*Title.*]

E. T., administrator of the estate of H. T., having filed a motion in this court for an order approving and authorizing the sale, or other disposition, of certain claims belonging to him as administrator as aforesaid, and which have become desperate and difficult to collect, and the court being fully advised in the premises, it is ordered that the claims described in, and attached to, said motion * be sold by said administrator at public auction, at the court-house of — county, Ohio, to the highest [cash]³ bidder for all of said claims; notice of such sale being first given by publication for four consecutive weeks in a newspaper of general circulation in said county of —.

¹ See sec. 6080.

² See sec. 6079.

³ See sec. 6081.

607 (Sec. 6077.) *Same, at private sale.*

[*Title.*]

*As in last to *, and continue:*—be sold [for cash]¹ at private sale, at not less than their appraised value.

Other orders as to private sale may be made, as in case of other personal property.

608. (Sec. 6077.) *Order that desperate claim be filed for benefit of creditor, &c.*

[*Title.*]

*As in No. 606 to *, and continue:*—be filed by said administrator in this court for the benefit of L. W., one of the creditors of the said H. T., who has made application therefor, and who is permitted to take the same, at their appraised value, as a credit on his claim.

Sec. 6087. Entries compelling the return of sale bill, or of private sale, may be similar to those given under secs. 6047-8-9, Nos. 590-3.

609. *Sale of personal property confirmed.*

[*Title.*]

The executor of the above-named decedent having filed his return of [*name any sale*], and the court having examined the same, find said proceedings in all respects regular and in accordance with law, and therefore affirm and confirm the same.

THE NOTICE TO CREDITORS; THE AUTHENTICATION AND PAYMENT OF DEBTS, AND PAYMENT OF LEGACIES—

610. (Sec. 6093.) *Referees approved of.*

[*Title.*]

The executor of the above-named estate having entered into an agreement with C. E., to refer the claim of the said C. E. to the following referees, viz: J. S., R. B., and W. D., the court hereby approve of said referees.

¹ See sec. 6081.

611. (Sec. 6096.) *Report of referees, in arbitration, in favor of claim, confirmed and judgment entered—by court of common pleas.*

[*Title.*]

It appearing that, by an agreement in writing entered into by the executor of the above-named decedent and C. E., the claim of the said C. E. was heretofore referred to J. S., R. B., and W. D., and now, the cause coming on to be heard on the report of the referees, and it appearing that all the conditions of the agreement to refer the matters in controversy have been complied with, and a copy of the award made by said referees duly furnished to the said parties,¹ * and the sum of \$—— having been, by said referees, awarded to the said C. E. against the executor of the decedent above named [*or specify any other judgment*], the aforesaid report and finding are hereby approved and confirmed. It is thereupon adjudged by the court that the said C. E. recover from the said C. D., the executor of the said H. T., deceased, the sum of —— dollars, so found to be due, together with his costs² herein expended, to be levied of the property of the testator in the hands of said executor.³

612. (Sec. 6096.) *Judgment against the claim, on report of referees.*

[*Title.*]

As in last to *, *and continue:*—and the said referees having found against the claim of the said C. E., it is therefore adjudged that the defendant go hence, without day, and recover from the plaintiff his costs herein expended.

613. (Sec. 6096.) *Report of referees set aside and new referees appointed.*

[*Title.*]

This cause coming on this day to be heard on the report of the referees to whom, by agreement of parties, the claim of C. E. against the estate above named had been referred, and on the motion to set the same aside, the court now find

¹ By sec. 5607.

² As to costs, see sec. 6106.

³ See *post*, page 320. See also sec. 6107.

that said report ought to be, and it hereby is, set aside and held for naught. And it is ordered that the matter be referred, upon the terms and conditions of the former reference, to W. R. W., L. E., and M. H., who are directed, after hearing, to make due report to this court.

Sec. 6097-8. The judgments here provided for will be in the usual form of judgments in the common pleas, except as follows :

It was said, in the case of *Haymaker's Ex'rs v. Haymaker*, 4 Ohio, St. 278, that if a judgment should be rendered against the executor, without adding the words, "to be levied of the property of the testator," it might, and probably would, be erroneous. These words should therefore be added to the judgment entry.

As to costs, sec. 6106 provides when they may not be recovered from the executor or administrator ; and that the court may direct that they be levied of the property of the defendant or of the deceased, as shall be just.

EXECUTOR'S OR ADMINISTRATOR'S CLAIM AGAINST THE ESTATE HE REPRESENTS—

614. (Sec. 6100.) *Order that notice of hearing be given.*

[*Title.*]

E. T., the executor of the decedent above named, having presented to this court his claim against said estate in the sum of \$——, the court now fix the —— day of ——, 18——, for the hearing of the same, and order that said executor give notice thereof in writing to all parties interested, as required by law.

615. (Sec. 6101.) *Claim of executor allowed.*

[*Title.*]

Now comes E. T., the executor of the above-named decedent, and presents to this court proof of the service of notice of the hearing of his claim upon all parties interested, as required by law and the order of this court ; and the court being satisfied therewith, said proof and service are hereby found to be properly and legally made, and are therefore approved. And, upon hearing of the testimony, the court finds said claim to be valid and correct, and does therefore

allow the same against the estate of the said W. C., deceased, in the sum of — dollars.

Sec. 6101. For entries in case of appeal, see Entry No. 279, page 384. Exceptions may be taken, bill of exceptions allowed, etc., as in common pleas.

Sec. 6111. For entries in case estate is declared insolvent, see page 345.

616. (Sec. 6105.) *Execution against executor allowed.*

[*Title.*]

On motion of A. B., he is hereby allowed to issue execution against E. T., as executor of M. B., deceased, on his judgment obtained in the court of common pleas of this county, in case No. — of that court, in the sum of \$—.

617. (Sec. 6107.) *Judgment of waste against executor.*

[*Title.*]

This cause coming on for hearing on the petition [*or, pleadings*] and evidence, the court find, upon the suggestion of the plaintiff, that the defendant, E. T., as executor of W. M., deceased, has been guilty * of waste to the amount of — dollars, and that he should be held personally liable to the plaintiff, to that extent, on account of plaintiff's judgment against the estate of the said W. M.

It is therefore considered by the court that said plaintiff recover from the defendant, E. T., personally, the said sum of \$—, together with his costs herein expended, and execution is awarded therefor.

618. (Sec. 6107.) *Same, when amount can not be ascertained.*

[*Title.*]

*As in last to *, and continue*] :—of waste, and, as the amount of said waste can not be ascertained, the court find that the said defendant should be held personally liable to the plaintiff, on account of plaintiff's judgment against the estate of W. M., to the full amount of said judgment and interest, viz., — dollars.

It is therefore considered [*as in last*].

619. (Sec. 6115.) *Order for payment of claim on which right of action will not accrue for four years.*

[*Title.*]

This day A. C. presented to the court a claim in the sum of \$—— against the above-named estate, which is not payable until the —— day of ——, 18——, more than four years from the date of the bond of the administrator of said estate: and, on examination, said claim appearing to be justly due. * it is now ordered, by the consent of the said A. C., and of the administrator of said estate, that the administrator pay the present value of said claim, to wit, the sum of —— dollars, to the said A. C. in full discharge of said claim.

620. [Sec. 6115.] *Order that administrator retain money for payment of claim named in last entry.*

[*Title.*]

*As in last to *, and continue*]:—it is now ordered that said administrator retain in his hands sufficient money to satisfy the same when it shall become payable.

621. (Sec. 6115.) *Order that bond be taken by owner of claim named in last two entries.*

[*Title.*]

A. C. having presented to the court a claim, in the sum of \$——, against the above-named estate, on which right of action will not accrue within four years after the date of the administration bond, and thereupon O. H., one of the heirs of the deceased, having offered to give bond with sufficient security to the said A. C. for the payment of said claim when it shall become payable, in case it shall be proved to be due, it is now ordered that said bond, with S. S. and G. B. as sureties, be taken by the said A. C., and that the administrator be released from payment of said claim.

622. (Sec. 6126.) *Allowing notice of appointment of executor to be given, etc.*

[*Title.*]

On hearing of the petition of the executor of the decedent above named, and it appearing that he failed to give notice

of his appointment, according to law, it is now ordered that he be allowed to give such notice forthwith.

623. (Sec. 6128.) *Order to distribute, etc., on bonds being given.*
[Title.]

On the written application of R. T. and A. D., two of the distributees of the above estate, it is ordered that the administrator be, and he is hereby, authorized, upon the execution to him by the said distributees, severally, of undertakings in the sum of — dollars each, with two sureties, to be approved by the court, to divide and transfer to each of them one-fourth part of all the bonds and stock which are reported in the inventory, and such portion of the cash as he deem expedient, on account of the respective distributive share of each. Said undertakings to be conditioned as required by section 6128 of the Revised Statutes of Ohio.

624. (Sec. 6128.) *Order for distribution, without bond being required.*
[Title.]

This cause coming on to be heard, and it appearing to the court that the report and account of W. A., executor of the last will and testament of H. C., deceased, are not excepted to, and that the filing of the same has been advertised and held open in accordance with law, the court, upon examination, allow and confirm the same. And it further appearing to the court that all of the debts brought to the knowledge of such executor have been paid, and that there is no probability of any others being presented, and it further appearing to the court that each and all of the legatees and distributees of said H. C., deceased, have demanded of and required said executor, W. A., to make payment of the whole of their respective legacies and bequests, and that all of the estate of the said H. C., deceased, has been reduced to money, the court, being advised in the premises, deeming it unnecessary that said legatees and devisees should be required to give bond to said executor for the refunding of the amount so to be paid to them respectively, or for the indemnification of the executor against loss or damage on account of such payment, do hereby relieve them from giving

said bond, and release the executor from any and all liability by reason of such payment.

And it is ordered by the court that said executor proceed, immediately after the payment of the costs of administration remaining unpaid, and of any claim or debts against the estate that may have been presented since the filing of his former report, or that may come to his knowledge before this distribution, to pay to the legatees and devisees the respective legacies and shares of the remainder of the estate coming to them; and that he file his final report herein.

FOREIGN EXECUTORS AND ADMINISTRATORS—

The proceedings by section 6131 to compel a foreign executor or administrator residing in the state to account must be instituted by a suit. The orders, on hearing of the petition, may be similar to the orders made on motion against an executor in other cases, as provided in section 6178.

625. (Sec. 6131.) *Order, on petition, that foreign executor render account.*

[*Title.*]

This cause came on for hearing this day upon the petition [*or, pleadings*] and the evidence; and the defendant having had due notice of this proceeding, the court find that the plaintiff is entitled to the relief prayed for in his petition.

It is therefore ordered that said defendant, C. D., as executor of the estate of M. D., late of Indianapolis, Indiana, deceased, make and file in this court within ——— days, as account showing what assets or property are in his hands as such executor.

If the above order be disobeyed it may probably be enforced by attachment and imprisonment. In which case make entries similar to entries Nos. 591 and 592.

626. (Sec. 6131.) *Order distributing amount found in hands of foreign executor.*

[*Title.*]

It appearing to the court that there is in the hands of C. D., executor, under the laws of Indiana, of the last will and

testament of M. B., deceased, the sum of \$——, belonging to said estate, to which the plaintiff herein is, by the laws of Indiana, entitled as legatee [*or, otherwise*] it is now therefore ordered that the said C. D. pay over said sum to the plaintiff, A. B. [upon a refunding bond, to the approval of this court, being given by said A. B. to said executor for its return to him in case it shall be needed for the purpose of paying debts of said estate.]¹

[*Add order as to costs.*]

ACTION FOR INJURY BY WRONGFUL DEATH—

This is a civil action, and the usual forms may be used, except that, in case of verdict for plaintiff, the verdict and judgment should, by section 6135, find and direct the proportion which each beneficiary shall receive.

The verdict may be as follows:

“ We, the jury, find on the issue for the plaintiff, and assess damages against the defendant by reason of the premises at —— dollars, to be divided among the beneficiaries as follows, to wit: To the said widow the [*name proportionate*] part thereof: to the said C. D. the [*name proportionate*] part thereof, etc.

[Signed]

R. M., Foreman.

627. (Sec. 6135.) *Judgment on last verdict.*

[*Title.*]

The jury having heretofore rendered a verdict herein for plaintiff for \$——, and no motion for a new trial having been made:

It is now therefore adjudged that the plaintiff recover from the said defendant the said sum of \$——, together with his costs herein expended; and that said plaintiff pay, first, the sum of \$——, necessary expenses connected with his action, and distribute the balance among the beneficiaries named in the petition in the proportion found by said verdict.

¹ See sec. 6131 as to when this will be required.

628. (Sec. 6135.) *Order that administrator settle claim.*

[*Title.*]

It appearing to the court that E. T., as administrator of H. T., makes a claim for damages against the C. N. and T. P. C. Railroad Company for causing the death of H. T., the decedent, and that said company proposes to settle said claim for the sum of — dollars, and that no suit has been brought on said claim; and the court being of the opinion, from the statements of said administrator, that said settlement is proper and for the best interests of the parties, he is hereby authorized to make the same, in full satisfaction of all claims and demands against said railway company by reason of the death of the said decedent.

And the court coming now to apportion said sum of \$—— among the beneficiaries, finds that it is fair and equitable, having reference to the age and condition of such beneficiaries, who are, etc. [*name*], that said amount should be apportioned as follows: To the said widow the sum of \$——; to the said M. T. the sum of \$—— [*and so continue to each beneficiary*]. And it is ordered that the said sum be apportioned accordingly.

SALE OF REAL ESTATE FOR PAYMENT OF DEBTS, AND DISTRIBUTION OF PROCEEDS.

These proceedings may be had in the common pleas court as well as in the probate.¹ If the land has been fraudulently conveyed, the executor may, by section 6140, recover the same, either by a separate action or in the petition to sell real estate. In either case, the decree may be in the form of Entry No. 460, modified to suit the case.

So, also, the proceedings, if begun in the probate court, may be taken to the common pleas by appeal.² In this case, the entries will be the same as if the case had begun in the common pleas, except that, in case of judgment, the opening and the closing of the entry will be in form as given under section 6410, Entry No. 779.

629. (Sec. 6146.) *Bond approved, and order for sale not granted.*

[*Title.*]

A petition having been filed herein for the sale of real es-

¹ See sec. 6137.

² Sec. 6407.

tate to pay the debts of the said E. F., deceased, this day came F. D. and gave bond to the administrator of the estate of the said E. F., in the sum of \$——, with H. R. and T. S. as sureties, to the approval of the court, conditioned as required by section 6146 of the Revised Statutes; and thereupon the order for sale is not granted.

630. (Secs. 6147 and 6153.) *Finding sale to pay debts not necessary.*

[*Title.*]

This cause coming on for hearing on the petition, and the motion to dismiss filed by ——, and the matter having been fully considered by the court, the court find that sale of the real estate for the payment of debts is not necessary.

It is therefore ordered that the cause be dismissed at the cost of ——.

SALE—WHERE THERE IS NO HOMESTEAD OR DOWER TO BE ASSIGNED.

631. (Sec. 6147.) *Sale ordered on appraisement contained in the inventory.*

[*Title.*]

This cause coming on this day to be heard upon the petition, proofs, and exhibits [*or the several pleadings may be specially named*], the court find that all of the defendants have been duly served with process, or have voluntarily entered their appearance in the case; and that, as set forth in the petition, it is necessary to sell the real estate [*or, a part of the real estate*] therein described, to pay the debts of the said E. F., deceased. *

It is therefore ordered and adjudged by the court that W. P., executor [*or, administrator*] as aforesaid, advertise and sell at public vendue [*on the premises*],¹ according to the appraisement contained in the inventory returned by him to the probate court,² the real estate described in the petition [*or any part of it may be specified*],³ on the following terms, to

¹ By sec. 6161, unless otherwise specially ordered, the sale will be made at the door of the court-house.

² Sec. 6154.

³ By secs. 6147 and 6149.

wit: one-third cash, the balance in two equal installments, payable in one and two years respectively, with interest, and secured by mortgage on the premises¹ [*or other terms as ordered*], and that the said W. P. make due return¹ to this court.²

Court may add by section 6151 :—

And it is further ordered that, before making said sale, the executor [*or, administrator*] give an additional bond in the sum of \$——, to the approval of this court, to secure the assets arising from said sale.

In case a new appraisement is to be made, it is the practice in Hamilton county, in all cases, to have it made and returned, and approved by the court, before the sale is ordered, although, by section 6154, where there is no dower to be assigned, the order for the appraisement and sale may be made at the same time.

The court is thus enabled to maintain a more careful scrutiny of the proceedings.

632. (Sec. 6147.) *New appraisement ordered.*

[*Title.*]

*As in last to *, and continue :—*

It is therefore ordered and adjudged by the court that the real estate described in the petition [*or any part of it may be described*]³ be appraised⁴ by the oaths of T. K., H. F., and J. H., judicious and disinterested freeholders of the vicinity, whom the court hereby appoint for that purpose,⁵ and that they return their proceedings to this court for confirmation.

¹ By sec. 6162.

² By sec. 6155, a copy of this decree must be issued to the executor or administrator.

³ By sec. 6149.

⁴ By sec. 6154.

⁵ By sec. 6155.

And it is further ordered by the court that W. B., J. L., and C. B., three judicious and disinterested men, freeholders of — county, Ohio, after being duly sworn, appraise the premises secondly described in said petition, located in said — county, and make due return to this court.

633 (Sec. 6147.) *Appraisement ordered, in case widow has waived dower by metes and bounds.*¹

[*Title.*]

*As in No. 631 to *, and continue:—*

And A. F., the widow of the said E. F., having, by her answer, waived the assignment of her dower by metes and bounds,¹ it is therefore ordered and adjudged by the court that the said premises be appraised, free of dower, by the oaths of T. K., H. F., and R. M., judicious and disinterested freeholders of the vicinity, whom the court hereby appoint for that purpose,² and that they return their proceedings³ to this court for confirmation.

[*If any property is in another county, see last entry for appointment of officers.*]

634. (Sec. 6147.) *Appraisement confirmed and decree for sale.*

[*Title.*]

Now comes N. J. & C., counsel for R. M., administrator as above named, and produce to the court the appraisement herein made of the real estate described in the petition herein, by T. K., H. F., and R. M., in pursuance of a former order of this court, and it appearing upon examination that said appraisement is in all respects regular and correct, the same is hereby approved and confirmed.* And it is ordered that W. P., executor [*or, administrator*] as aforesaid, advertise and sell the real estate aforesaid [*free of dower*] at public vendue [*on the premises*],⁴ on the following terms, to wit: one-third cash, the balance in two equal installments, payable in one and two years respectively, with interest, and secured by mortgage on the premises [*or other terms as ordered*], and that the said W. P. make due return⁵ to this court.

Court may add by sec. 6151:—

And it is further ordered that before making said sale the executor [*or, administrator*] give an additional bond in the sum of \$——, to the approval of this court, to secure the assets arising from said sale.

¹ By sec. 5719. As amended April 3, 1889, 86 v. 185, this section is made to pertain to the dower of a widower as well as of a widow. This and subsequent entries may be modified accordingly.

² By sec. 6155.

⁴ By sec. 6161.

³ By sec. 6157.

⁵ By sec. 6162.

SALE WHERE THERE IS DOWER TO BE ASSIGNED---

635. (Sec. 6155; 83 v. 105.) *Order for assignment of dower,¹ and appraisement of premises.*

[*Title.*]

*As in No. 631, to * and continue:—*

And it appearing to the court that A. F., the widow¹ of E. F., deceased, is entitled to dower in said premises, it is hereby ordered that T. R. P., H. F. M., and J. H., judicious and disinterested freeholders of the vicinity, after being duly sworn, set off and assign the same in the whole of said lands [*or, in each of said tracts of land; or it may all be assigned from one tract*], and appraise said premises, either as a whole or in parcels, subject to such dower so assigned; and that they return their proceedings² to this court for confirmation.

636. (Sec. 6155; 83 v. 105.) *Assignment of dower by metes and bounds, and appraisement of premises confirmed, and decree for sale.*

[*Title.*]

And now this cause coming on to be heard on the return of T. K. P., H. F. M., and J. H., of their proceedings in the assignment of dower and appraisement of premises under the former order of this court, the court being fully advised in the premises, find said proceeding to be in all respects in conformity to law, and they are hereby approved and confirmed.

It is therefore ordered and adjudged that the said A. F. have and possess the lands so assigned to her, to wit [*describe*], as and for her dower in said premises.* And it is ordered that said plaintiff proceed, according to law, to advertise and sell said real estate, subject to said dower interest of the said A. F., upon the following terms, to wit [*state terms of sale*], [and that said sale take place upon the premises].³ And it is ordered that said executor make due return of his proceedings to this court.

[*The clause ordering additional bond as after decree No. 631, may be added here.*]

637. (Sec. 6155; 83 v. 105.) *Assignment of dower, as of rents and profits, and appraisement of premises confirmed, and decree for sale.*

[*Title.*]

And now this cause came on for hearing upon the return of T. K. P., H. F. M., and J. N., of their proceedings in the assignment of dower and appraisement of premises under the former order of this court; and it appearing that said dower has been assigned as of the rents and profits in the annual sum of — dollars, the court find all of said proceedings in all respects in conformity with law, and they are hereby approved and confirmed.

It is therefore adjudged by the court that the said A. F. stand endowed of the rents, issues, and profits of the said premises, in the annual sum of \$—. And the said premises are hereby charged

¹ See note 1, p. 330.

² By sec. 6157.

³ By sec. 6161.

with the payment of the same, on the — day of —, of each and every year of the natural life of the said A. F.¹ [*conclude as from * in last*].

SALE WHERE HOMESTEAD IS TO BE SET OFF—

637a. (Sec. 6155; 83 v. 105.) *Order for setting off homestead, and for appraisement.*

[*Title.*]

*As in No. 631 to *, and continue:—*

And it appearing to the court that the said E. F., deceased, left a family homestead, and application² having been made by [*widow or minor child*] to have the same set apart to her [*or, him*] the court find that she [*or, he*] is entitled thereto. It is therefore ordered that T. R., H. F., and J. H., judicious and disinterested freeholders of the vicinity, after being duly sworn, first set off and assign such homestead to the said —, not exceeding in value the sum of \$—³*, and then appraise said premises subject to such homestead, and return their proceedings to this court for confirmation.

637b. (Sec. 6155.) *Appraisement confirmed, and decree for sale.*

[*Title.*]

*As in No. 634 to * and continue:—*

And it is ordered that U. P., executor [*or, administrator*] as aforesaid, advertise and sell the real estate appraised as aforesaid at public vendue [*may be on the premises*]⁴ on the following terms, to wit: one-third cash, the balance in two equal installments, payable in one and two years respectively, with interest, and secured by mortgage on the premises [*or other terms as ordered*], and make due return to this court.

SALE WHERE BOTH HOMESTEAD AND DOWER ARE TO BE ASSIGNED.

637c. (Sec. 6155; 83 v. 105.) *Order for, and for appraisement.*

[*Title.*]

*As in No. 637a to * and continue:—*

And it also appearing that A. F., the widow of E. F., deceased, is entitled to dower in said premises, it is hereby ordered that the appraisers hereinabove named also before appraising said premises set off and assign to her, by metes and bounds, one equal third part of said lands as and for such dower, and that subject to such homestead and dower they appraise said premises, and return their proceedings to this court for confirmation.

[*The decree of confirmation may be in the form of entry No. 636 or 637.*]

IN GENERAL—

638. (Sec. 6156.) *Order substituting appraiser.*

[*Title.*]

It appearing to the court that L. M., one of the appraisers appointed herein, is unable by reason of sickness [*or other cause*] to discharge his duties as such, R. T., a judicious dis-

¹ By sec. 6144.

³ See secs. 5438 and 5440.

² See secs. 5437 *et seq.*

⁴ By sec. 6161.

interested man of the vicinity, is hereby appointed as an appraiser in his stead, under the former decree of the court herein.

639. (Sec. 6160.) *Order directing sale for certain amount.*

[*Title.*]

It appearing to the court that the real estate herein ordered to be sold has been twice offered for sale under the present appraisement, and not sold for want of bidders, it is now, on motion, ordered * that said real estate may be sold for the sum of — dollars.

640. (Sec. 6160.) *Order for new appraisement.*

[*Title.*]

*As in last to *, and continue :*—that said appraisement be set aside, and a re-appraisement of the same be made by the oaths of G. H. R. W., and L. E., judicious and disinterested freeholders of the vicinity, whom the court hereby appoint for that purpose.

PRIVATE SALE—

641. (Sec. 6161.) *Decree for private sale.*

[*Title.*]

[*If the order for private sale is made in the first instance, make the entry as in Nos. 631, 634, 636, or 637, according to circumstances, to *, and continue as follows :*—

And it appearing to the court that it would be more to the interest of said estate to sell the real estate described in the petition at private sale, * it is therefore ordered and decreed by the court that the said T. L., administrator, proceed to sell said premises [free of dower] according to law, at private sale, for not less than the appraised value, and upon the following terms, to wit [*state terms*]; and that he report his proceedings hereunder immediately after such sale is made.

Court may add by sec. 6151]

And it is further ordered that before making said sale the executor [*or, administrator*] give an additional bond in the sum of \$— to secure the proceeds of said sale.

642. (Sec. 6161.) *Order for private sale, after appraisement confirmed.*

[*Title.*]

This cause coming on this day to be further heard, and it appearing to the court that the appraisement heretofore ordered to be made in this case has been made, and confirmed by this court, and it further appearing from evidence produced that it would be to the interest of said estate to sell the real estate described in the petition at private sale [*conclude as from * in last entry*].

643. (Sec. 6161.) *Order for private sale, on report of offer made.*

[*Title.*]

This cause came on this day to be heard upon the report of the plaintiff that he has had an offer for the real estate in the petition described from W. E. P., to purchase the same at private sale for the sum of — dollars; and it further appearing to the court by testimony offered that it will be more to the interest of said estate to sell such real estate at private sale, and that the said offer for the same is more than the appraised value thereof, it is hereby ordered and adjudged that the said executor sell said real estate at private sale to said W. E. P. for said sum of \$—.

CONFIRMATION OF SALE AND DISTRIBUTION OF PROCEEDS—

644. (Sec. 6162.) *Decree of confirmation of sale, and distribution of proceeds.*

[*Title.*]

This cause now coming on to be heard on the return of W. P., executor [*or*, administrator], of his proceedings and sale under the order of this court, the court, after having carefully examined said return, being satisfied that such sale has in all respects been legally made, does hereby approve and confirm the same, and order that the said W. P., as such executor [*or*, administrator], make to the purchaser, L. M., a good and sufficient deed for the premises so sold. *

And the court coming now to distribute the proceeds of said sale in the hands of the said W. P., order that he pay: ¹

¹ By sec. 6165.

First. The costs of this action, including \$—, as the charges due the executor herein, taxed at \$—.

Secondly. The court find that the mortgage to P. L., set up in his answer and cross-petition, is the first and best lien on the premises sold,¹ and that there is due thereon the sum of \$—. It is therefore ordered that said executor pay next to the said P. L. the said sum of \$—.

Thirdly. It is ordered that said executor pay next the claim of R. W., amounting to \$—.

[*Conclude distribution according to priorities.*]

645. (Sec. 6162.) *Decree of confirmation and distribution after private sale.*

[*Title.*]

This cause came on this day to be heard upon the report of the plaintiff of sale made to W. E. P. for the sum of \$—, as hereinbefore ordered, and the proceedings appearing in all respects regular and in conformity to the law, they are hereby approved and confirmed. And the said J. W. A., executor of E. A., is ordered to execute and deliver to the said purchaser a good and sufficient deed for the premises so sold. *

[*Conclude as from * in last decree.*]

646. (Sec. 6162.) *Decree of confirmation and distribution where dower by metes and bounds was waived.*

[*Title.*]

*As in No. 644 to *, and continue:—*

And the said J. B. having by his answer elected to receive in lieu of her dower its value in money, the court find the just and reasonable value thereof to be — dollars.

And the court coming now to distribute the proceeds of said sale in the hands of said executor, orders that he pay:

First. The costs of this action, including \$—, as the charges due the executor, taxed at \$—.

Secondly. It is ordered that said executor pay to said J. B. the said sum of \$—, in lieu of her dower, as above found by the court.

¹See secs. 6145 and 6165.

Thirdly. [*Continue distribution as in decree No. 644*].

647. (Sec. 6166.) *Sale of equitable interest ordered.*

[*Title.*]

This cause coming on this day to be heard upon the petition, proofs, and exhibits [*or the several pleadings may be specially named*], the court find that all of the defendants have been duly served with process, or have voluntarily entered their appearance in the case. The court further find that there is not sufficient personal property to pay the debts of the said E. F., deceased, and that he was at the time of his death, as set forth in the petition, the owner of an equitable interest, to wit [*describe*], in the real estate described in the petition, and that it is necessary to sell the same, for the payment of such debts.

It is therefore ordered and adjudged by the court that the equitable interest as aforesaid, free of all dower interest of A. F., widow of the said E. F., be appraised by the oaths of T. K. P., H. F., and R. M., judicious and disinterested freeholders of the vicinity, whom the court hereby appoint for that purpose, and that they return their proceedings to this court for confirmation.

The decree confirming appraisement and ordering sale may be in the form of Entry No. 634, substituting equitable interest for real estate. The decree confirming sale and ordering distribution is in the following form :

647*a*. (Sec. 6166.) *Sale of equitable interest confirmed, and order for distribution.*

[*Title.*]

*As in Entry No. 644 to *, and continue*]:—

And the court coming now to distribute the proceeds of said sale, find that the value of a life annuity, to the said A. F., in one-third of such equitable estate, in lieu of her dower interest therein, is — dollars.

It is therefore ordered that the executor pay :

First. The costs of this action, including \$——, as the charges due the executor, taxed at \$——.

Secondly. To the said A. F., widow, the said sum of \$——, so found due her as above, in lieu of her dower interest.

Thirdly. [*Continue distribution, if there are any liens to be paid off, as in decree No. 644*].

648. (Sec. 6168.) *Copy of appointment of foreign executor filed.*
[*Title.*]

Now comes F. E., and files in court an authenticated copy of his appointment in the county of —, State of —, as executor of the estate of L. D., together with an authenticated copy of the will of the said L. D., deceased.

THE ACCOUNT AND COMPENSATION OF AN EXECUTOR OR ADMINISTRATOR; AND DISTRIBUTION IN CERTAIN CASES—

649. (Sec. 6175.) *Account current of administrator filed and suspended.*
[*Title.*]

This day came the administrator herein, and presented an account current, which is ordered filed and suspended.

650. (Sec. 6175.) *Final account of administrator filed and suspended.*
[*Title.*]

This day came the administrator herein, and presented a final account, which is ordered filed and suspended.

Sec. 6178. To compel an executor or administrator to render his account, entries may be made in same form as Nos. 590, 591, and 593.

651. *Account allowed and confirmed, and order of distribution.*
[*Title.*]

This matter came on to be heard on the motion of P. J., attorney for the executor of the above-named decedent, to confirm the account filed February 20, 1881; and the court finding that the same was duly published as required by law, and no exception being filed to the same, and having examined the said account and found it in all respects correct, it is hereby allowed and confirmed.

And the court now coming to the distribution of the money on hand as reported by the executor aforesaid, find that there has been paid to L. J., the son of the testator, to date by said executor the sum of \$—, and to M. J., daughter of said testator, the sum of \$—, and that there is still due to L. J.

the further sum of \$——, and to M. J. the further sum of \$——; and the court find that there is due to S. J., widow of A. J., the testator, the sum of \$——. It is therefore ordered that said executor pay the sums above found to the parties respectively, and report the vouchers therefor to this court.

The order of distribution will, of course, often be made as a separate entry.

652. *Suspended account allowed and confirmed.*

[*Title.*]

The account of the executor herein heretofore on the —— day of ——, 18—, filed and suspended, was this day, after being examined, duly allowed and confirmed.

When several accounts are examined and allowed at the same time, the order may be entered as follows :

653. *Various accounts and vouchers allowed and confirmed.*

[*Title.*]

The following accounts and vouchers of executors, administrators, guardians, and assignees, heretofore filed and suspended herein, were this day examined and duly allowed and confirmed, to wit :

EXECUTORS AND TRUSTEES.

23,722. A. S. Filed and suspended, October 3, 1881.
etc. etc.

ADMINISTRATORS.

21,061. J. B. Filed and suspended, August 17, 1881.
etc.

GUARDIANS.

20,203. R. P. Filed and suspended, October 12, 1881.
etc.

ASSIGNEES.

P. H. S.

etc.

654. *Accounts of administrator confirmed, on exceptions heard.*

[*Title.*]

This cause coming on to be heard on the account of M. P., administrator, filed —, 18—, and the exceptions thereto, the court, upon due consideration thereof, * find that said exceptions are not well taken, and that said account is in all respects correct and according to law, and do hereby approve and confirm the same.

[*Add any order made as to costs.*]

655. *Account disallowed.*

[*Title.*]

*As in last to *, and continue:*]—find the exceptions well taken in this, that amount of \$—, charged for commission on the sale of the house on — street, is incorrect, and is disallowed: but in all other respects said account is found to be correct, and is allowed and confirmed.

[*Add any order made as to costs.*]

656. *Exceptions withdrawn.*

[*Title.*]

On motion of T. C., attorney for W. M., the exceptions heretofore filed by him to administrator's account are hereby withdrawn by leave of court.

657. (Sec. 6186.) *Account referred to a special commissioner.*

[*Title.*]

*As in No. 654 to *, and continue:*]—refer the same to T. S., who is hereby appointed a special commissioner to examine said account, and report to this court.

On coming in of the report it may be confirmed, and the account allowed or disallowed accordingly.

658. (Sec. 6187, 81 O. L. 137.) *Order opening settled account.*
[Title.]

It appearing to the court that the accounts of E. T., administrator of the above estate, were settled in the absence of A. S., and without actual notice to him, and that he has filed exceptions to said account, it is now ordered that said account be opened for the hearing and consideration of the exceptions named.

Sec. 6188. It is the practice of the Probate Court of Hamilton county not to make a special order allowing the regular compensation to executors and administrators, but to require them to state their compensation as an item of their accounts, and then, if no exception is taken, it is confirmed with the other items of the account.

659. (Sec. 6188.) *Allowance for expenses and special services.*
[Title.]

On motion of A. R., the executor herein, and it appearing just and proper, he is hereby allowed out of the estate above named the sum of \$—— for expenses incurred by him in [specify], and also the sum of \$—— for services as attorney rendered to said estate.

660. (Sec. 6189.) *Order for distribution of notes, bonds, etc.*
[Title.]

The executor herein having paid all the debts of the said estate, and having remaining in his hands certain notes and bonds belonging to the estate, it is now ordered by agreement of all parties interested that said executor distribute said notes and bonds among the distributees of said estate as follows, to wit, to R. S. the note of W. M., dated —, 18—, for \$——, payable in — years from date to S. T., etc.

661. (Sec. 6190.) *Account of payments filed and allowed as final discharge.*

[Title.]

Now comes the executor of the above-named decedent, and presents to the court an account of his payments made to the distributees according to the order of the court; and said account being duly proved to the satisfaction of the

court, and verified by the oath of said executor, it is ordered that it be allowed as the final discharge of said executor, and be recorded in this court.

662. (Sec. 6191, 81 O. L. 139.) *Order for investment, etc., of unclaimed money.*

[*Title.*]

It appearing to the court that T. H., the executor of S. S., deceased, has in his hands the sum of \$——, which he was ordered to pay to the heirs of R. S., but which has for more than six months been unclaimed, it is hereby ordered that said executor invest said sum in [*name securities*], in the name of J. B. M., judge of this court, for the time being, and hold the same subject to the further order of court. [*Or, that said executor pay said sum into the county treasury for the benefit of the person entitled thereto.*]

663. (Sec. 6192, 81 O. L. 139.) *Order for payment to distributee.*

[*Title.*]

Now comes S. R., and proves to the satisfaction of the court that he is the sole heir of R. S., and one of the distributees of the estate of S. S., and the part of the same belonging to him having been invested by order of court in [*name securities*], [*or, turned into the county treasury*], it is now ordered that they [*or, it*] be turned over and transferred to him as such distributee. [*In case of money add, and that he receive a warrant therefor from the county auditor.*]

For an order to invest money pending suit, etc., see Entry No. 780, page 384.

664. (Sec. 6195.) *Citation issued against executor or administrator, for failing to pay money.¹*

[*Title.*]

On petition of L. W., and it appearing to the court that heretofore, by order entered on the —— day of ——, 18——, the assignee herein was ordered to pay from the assets in his hands the sum of \$—— to L. W., and it appearing that said assignee, though frequently requested, has refused to pay said sum, it is therefore, on motion of W. T., attorney for F. S., ordered that a citation issue to said assignee, E. B., returnable on the —— day of ——, 18——, at 10 o'clock A. M., for

¹ May be made in common pleas or probate court, by sec. 6200.

him to show cause why judgment should not be rendered and execution awarded against him for failure to comply with said order.

665. (Sec. 6196.) *Order for publication against non-resident,¹ executor, etc.*

[*Title.*]

R. M., the defendant herein, being a non-resident of the State of Ohio, it is ordered that he be brought into court by publication to be made in the Cincinnati Daily *Gazette*, according to law, as provided in sec. 6196 of the Revised Statutes.

Sec. 6197. Judgment under this section may be in the ordinary form of judgment in civil actions.

666. (Sec. 6198.) *Amended or supplemental petition allowed¹ making new parties.*

[*Title.*]

It appearing to the court that for the purpose of making distribution of the above-named estate, it is necessary to determine whether [*state question*], and that there are other parties in interest who should have notice of this proceeding, it is now ordered that the plaintiff file an amended [*or, supplemental*] petition, making the following-named persons parties hereto, viz. [*give names*], and that a citation issue on said amended [*or, supplemental*] petition, returnable according to law.

667. (Sec. 6198.) *Finding and order on submitted question.¹*

[*Title.*]

This matter now coming on to be heard, the court find that all parties interested are properly before the court; and the question being submitted to the court whether [*state question*], and the testimony being heard, the court having duly considered the same, find [*state finding*].

It is therefore ordered that the said W. M. be charged with the said sum of \$—, in settling and distributing said estate

¹ May be made in common pleas or probate court, by sec. 6200.

[*or other order*], and that — pay the costs of this proceeding.

668. (Sec. 6198.) *Same, by agreement.*¹

[*Title.*]

This matter came on this day to be heard on the agreement in writing now filed herein, made by the administrator of said estate and the next of kin and distributees thereof, viz. [*name parties*], submitting to the award and decision of the judge of this court, as referee, whether [*state question*]. And all said parties being present, and the testimony heard, the court, having duly considered the same, find and award that [*state finding*].

It is therefore ordered that the said W. M. be charged with said sum of \$——, in settling and distributing said estate [*or other order*], and that — pay the costs of this proceeding.

669. (Sec. 6199.) *Order reserving case to common pleas court.*

[*Title.*]

On motion of —, one of the parties hereto, this case is reserved to the Court of Common Pleas of this county for hearing and decision upon [*state question or matter reserved*].

670. (Sec. 6202.) *Judgment construing any matter respecting the estate.*

[*Title.*]

And now this cause came on to be heard on the petition of the plaintiff, asking for the direction and judgment of the court in construing certain parts of the will of L. M., of which said plaintiff is executor, and upon certain questions presented in said petition, and upon the answers of C. D. and E. F., all of the other defendants being in default for pleading.

And thereupon the court, after careful consideration, find and adjudge the true intention and construction of said will to be as follows, to wit [*set out in full*].

¹ May be made in common pleas or probate court, by sec. 6200.

It is therefore considered by the court [*set out any direction the court may make*].

THE ADMINISTRATION BOND ; SURETIES IN ; SUIT ON—

671. (Sec. 6204.) *Order releasing surety.*

[*Title.*]

This day came B. S., and his application to be released from the bond of F. E., administrator of the estate of F. M., came on to be heard, and due notice thereof having been given to the said administrator, and good reason shown, the application is granted ; and it is ordered that said administrator give a new bond within — days.

672. (Sec. 6204.) *Administrator removed for failing to give new bond.*

[*Title.*]

It appearing to the court that S. D., administrator of the above-named estate, has failed to give a new bond within the time provided by the former order of the court, he is hereby removed from the administratorship of said estate.

And W. K. is hereby appointed administrator *de bonis non* of said estate, and it is ordered that he give bond in the sum of — dollars. It is further ordered that said S. D. do forthwith deliver to W. K., as said administrator *de bonis non*, upon his being qualified as such, all moneys and property in his hands, and pay over to him the balance due and owing to said estate, as shown by his accounts filed herein.

673. (Sec. 6205.) *Bond insufficient, new bond required.*

[*Title.*]

On petition of A. C., and notice to the administrator, and the court finding that the bond of said administrator is insufficient, it is ordered that he give a new bond, with two sureties to the approval of this court, within — days.

Sec. 6207. The order removing administrator for not giving bond may be similar to Entry No. 672.

Sec. 6208. The order for an account may be similar to Nos. 590, 591, and 592.

674. (Sec. 6208.) *Order for bond of indemnity.*

[*Title.*]

On application of B. S., one of the sureties on the bond of E. T., administrator of the estate of F. E., and for good cause shown, the court hereby directs that said E. T. execute a bond of indemnity to the said B. S., as such surety, within — days.

Sec. 6208. The entry of removal may be similar to Entry No. 672.

675. (Sec. 6212.) *Leave to bring suit on bond of executor.*

[*Title.*]

This day this cause came on to be heard on the motion of R. W., legatee under the will of H. W., deceased, for leave to bring suit on the bond, and against the bondsmen, of F. M., executor. And it appearing to the court that [*make statement necessary*], the motion is granted, and leave is given to bring suit accordingly for the benefit of the estate of F. M., deceased.

Sees. 6218 and 6223. Judgments may be as in ordinary civil cases modified to suit the facts.

PROCEEDINGS WHEN THE ESTATE OF A DECEASED PERSON IS INSOLVENT—

676. (Sec. 6224.) *Commissioners appointed.*

[*Title.*]

It appearing to the court, from the representations of the executor, that the estate of F. M. will probably be insufficient for the payment of his debts, the court now appoint C. M. and J. W. commissioners * to receive and examine all claims of creditors against said estate, and to return to the court a list of all claims laid before them, with the sum they shall allow on each. And it is ordered that they give notice of the times and places of their meeting, by publications in some newspaper of general circulation in the county of —.¹

¹ By sec. 6225. Or the order may be for posting notices in the township where the deceased last dwelt.

And now come the parties above named, and are duly sworn as such commissioners.

677. (Sec. 6226.) *Further time allowed to commissioners.*

[*Title.*]

On motion, the court grant — months further time to the creditors to present their claims to the commissioners heretofore appointed in this case.

678. (Sec. 6230.) *Order allowing, or disallowing, claim on appeal from commissioners.*

[*Title.*]

On hearing and full consideration on appeal from the commissioners' allowance [*or, disallowance*] of the claim of A. D. against the estate of F. M., the court find that said claim ought not to be [*or, ought to be*] allowed. *

It is therefore adjudged by the court that the said claim be not allowed against said estate [*or, be allowed against said estate by L. C., the executor (or, administrator thereof) in the sum of — dollars*]. And it is ordered that — pay the costs of this proceeding, and execution is awarded therefor.

679. (Sec. 6231.) *Order, on petition, allowing appeal.*

[*Title.*]

This cause coming on this day to be heard on the petition of the plaintiff for leave to prosecute his appeal from the decision disallowing his claim, heretofore made by the commissioners appointed by the court to examine the claims against the estate of the said E. F., and it appearing to the court that the executor [*or, administrator*] has had due legal notice of said petition, and that the plaintiff's omission to claim his appeal was not by his own neglect, but by reason of accident [*or other cause*], and it further appearing, by affidavit of —, that justice requires a further examination of said claim, it is now ordered and adjudged that said plaintiff's appeal to this court be allowed, on payment of the costs of this proceeding [*and any other special terms*], and that said appeal be retained for further hearing.

680. (Sec. 6232.) *Order allowing claim on appeal in last entry.*
[Title.]

*As in No. 678 to *, and continue:*—and adjudge accordingly: said claim to be paid out of any assets remaining in [*or, coming into*] the hands of such executor, after payment of all money due on prior orders of distribution.

And it is ordered that — pay the costs of this proceeding, and execution is awarded therefor.

681. (Sec. 6235.) *Order for distribution, on report of commissioners.*

[Title.]

It appearing from the report of the commissioners heretofore appointed by this court [*or, of the administrator of the estate, or, executor of said F. M., deceased*] that the claims allowed against the above-named estate amount to \$—, and that the costs and expenses of administration amount to \$—, it is ordered that the executor [*or, administrator of the estate*] of said decedent pay over the balance of the assets in his hands, to wit, the sum of \$—, to the creditors entitled thereto, according to law, paying to each one — per cent of his claim: and that he report his proceedings to this court.

On the report being filed it should be confirmed: the entry may be in the form of No. 661, *ante*.

682. (Sec. 6236.) *Estate declared probably insolvent, executor authorized to act in place of commissioners.*

[Title.]

It appearing from the representations of the executor that the estate of F. M. will probably be insolvent, but the court not deeming it necessary to appoint commissioners, the executor is hereby authorized, in place such commissioners [*conclude as from * in No. 676*].

Sec. 6239. For entry extending time, etc., modify Entry No. 677.

Sec. 6240. For entry referring claim disallowed by executor, modify Entry No. 610, and those following.

683. (Sec. 6243.) *Judgment on the award of the referees.*

[*Title.*]

On hearing by the court, for judgment on the award made by the referees allowing [*or, disallowing*] the claim of A. D. against the estate of F. M., the court find that said claim ought [*or, ought not*] to be allowed, and the award of the referees is therefore confirmed [*or, set aside*].

It is therefore adjudged by the court that the claim aforesaid be allowed against the said estate, by the executor thereof, in the sum of — dollars [*or, be not allowed against said estate*]; and it is ordered that — pay the costs of this proceeding.

684. (Sec. 6243.) *Judgment in suit brought under sec. 6241.*

[*Title.*]

Use regular judgment finding, page 99, or if by default, finding, page 100 to ❖, and continue:—that the claim of the plaintiff ought [*or, ought not*] to be allowed.

It is therefore adjudged by the court that the claim of the said A. D. against the estate of the said F. M. be allowed by S. C., the executor [*or, administrator*] thereof, in the sum of — dollars [*or, be not allowed*]; and it is ordered that — pay the costs of this proceeding.¹

Sec. 6244. For order of distribution, modify Entry No. 681.

685. (Sec. 6244.) *Allowance of claim confirmed or set aside, on exceptions heard.*

[*Title.*]

This cause came on this day for hearing on the exceptions filed by — to the executor's allowance of the claim of W. D., for the sum of \$—, against the above-named estate; and upon full hearing the court find that said claim is just, and ought to be allowed [*or, find that said claim ought not to be allowed*], and therefore overrule [*or, sustain*] the exceptions thereto.

¹ As to costs, see sec. 6242.

Sec. 6252. For orders compelling an account, modify entries to compel the return of an inventory, Nos. 590-3.

CHAPTER III.

GUARDIANS AND TRUSTEES.

OF MINORS—

- 686. (Sec. 6255.) Letters granted for minor under fourteen [*or*, female under twelve] years of age.
- 687. (Sec. 6257.) Guardian appointed on selection of minor.
- 688. (Sec. 6257.) Guardian appointed on minor failing to select.
- 689. (Sec. 6259.) Mortgage received from guardian in lieu of bond.
- 690. (Sec. 6261.) Exceptions to guardian's bond dismissed.
- 691. (Sec. 6261.) Additional sureties required on bond.
- 692. (Sec. 6261.) Security in a larger amount ordered.
- 693. (Sec. 6261.) Order for new bond, made by court on its own motion.
- 694. New bond of guardian given.
- 695. (Sec. 6268.) Bond subsequently required of guardian relieved by will from giving one.
- 696. (Sec. 6269.) Guardian removed for failing to file inventory.
- 697. (Sec. 6269.) Order for special account.
- 698. (Sec. 6269.) Order authorizing guardian to loan money, etc.
- 699. (Sec. 6273.) Surety released, new bond ordered.
- 700. (Sec. 6273.) Guardian removed for failing to give new bond.
- 701. (Sec. 6274.) Resignation of guardian accepted.
- 702. (Sec. 6277.) Guardian removed, on removal of ward to another state.
- 703. (Sec. 6279.) Foreign guardian authorized to receive money from executor or administrator.

SALE OF REAL ESTATE BY GUARDIAN—

- 704. (Sec. 6282.) Notice of petition ordered.
- 705. (Sec. 6283.) Order for appraisement when there is no dower interest.
- 706. (Sec. 6283.) Order for appraisement in case widow has waived dower by metes and bounds.
- 707. (Sec. 6283.) Order for appraisement in case there is a dower interest which the appraisers do not set off, but subject to which the appraisement is made.
- 708. (Sec. 6283.) Order for assignment of dower and appraisement of premises.
- 709. (Sec. 6285.) Bond of guardian ordered and approved.
- 710. (Sec. 6286.) Bond of guardian approved and order for sale.
- 711. (Sec. 6286.) Assignment of dower by metes and bounds confirmed and decree for sale.

712. (Sec. 6286.) Assignment of dower as of rents, etc., confirmed and order for sale.
 713. (Sec. 6286.) Order for private sale.
 714. (Sec. 6286.) Same—on offer reported.
 715. (Sec. 6287.) Sale confirmed and deed ordered.
 716. (Sec. 6287.) Same—when widow has waived dower by metes and bounds, etc.

LEASING OF REAL ESTATE—

717. (Sec. 6298.) Freeholders appointed to report on guardian's application to lease real estate of ward.
 718. (Sec. 6299.) Order for guardian to lease.

OF LUNATICS, IDOTS, AND IMBECILES—

719. (Sec. 6302.) Letters of guardianship granted.
 720. (Sec. 6307.) Sale of dower right by guardian approved.
 721. (Sec. 6315.) Foreign guardian authorized to act in county.
 722. (Sec. 6316.) Entry of termination of guardianship.

OF DRUNKARDS—

723. (Sec. 6319.) Order that guardianship cease.

TRUSTEES OF NON-RESIDENTS—

724. (Sec. 6320.) Order appointing, of non-resident minor, etc.
 725. (Sec. 6325.) Order that trustee pay over money to foreign guardian.

TRUSTEES GENERALLY AND THEIR ACCOUNTING—

OF MINORS—

686. (Sec. 6255.) *Letters of guardianship granted for minors under fourteen [or, if female, twelve] years of age.*¹

[*Title.*]

Upon application, the court grants to C. M. letters of guardianship for the estate and person [or either]¹ of E. M., a minor, aged — years, and M. A. M., a minor, aged — years, children of G. M., deceased [the said C. M. being named for such guardian in the will of of the said G. M].²

* Whereupon he accepted said appointment [and filed a

¹ If the appointment is for the person only, it is well enough for the journal entry to show the reason for the appointment.

² See sec. 6267.

statement, as required by law, of the whole estate of said minors, and the probable value thereof, and also of the probable annual rents of said minors' real estate],¹ was duly sworn, and presented his bond² as such guardian in the sum of — dollars, with F. S. and M. S. as sureties, which bond is approved by the court. [*But if by the terms of a will no bond is required, say: Bond being dispensed with by said will, none is required.*]³

687. (Sec. 6257.) *Guardian appointed on selection of minor.*

[*Title.*]

Upon application, and C. M. having been selected as guardian by D. M., a minor, of the age of — years, and the court being satisfied that he is a suitable person, letters of guardianship are hereby granted to the said C. M., for the estate and person [*or either*] of the said D. M., child of B. M., deceased.

[*Conclude as from * in last.*]

688. (Sec. 6257.) *Guardian appointed for minor of fourteen [*or, if female, twelve*] years, who fails to select.*

[*Title.*]

D. M., a minor, of the age of — years, having failed to select a guardian, the court, on application, grants letters of guardianship to C. M., for the estate and person [*or either*] of the said D. M., child of B. M., deceased.

[*Conclude as from * in No. 686.*]

689. (Sec. 6259.) *Mortgage received from guardian in lieu of bond.*

[*Title.*]

Instead of clause in the entries of appointment of bond presented, say: presented, in lieu of a bond, a mortgage duly executed to said minor upon good and unincumbered real

¹ By sec. 6259. If the guardian is appointed for the person only, omit this clause in brackets.

² See secs. 6259 and 6263. When mortgage is given in lieu of bond, see Entry No. 689, for clause to be substituted for this.

³ See sec. 6268.

estate; and the court being satisfied, by affidavits, with the sufficiency of said security, order said mortgage to be recorded and filed according to law.

690. (Sec. 6261.) *Exceptions to guardian's bond dismissed.*

[*Title.*]

Upon full hearing of the exceptions filed herein by C. B. to the sufficiency [*or, sureties*] of the bond of C. M., guardian of D. M., the court find * that the said exceptions are not well taken, and they are therefore dismissed.

691. (Sec. 6261.) *Additional sureties required, on hearing of exceptions to bond of guardian.*

[*Title.*]

*As in last to *, and conclude:*—said exceptions to be well taken, and order that said guardian find additional sureties within — days.

692. (Sec. 6261.) *Security in a larger amount ordered.*

[*Title.*]

*As in No. 690 to *, and conclude:*—said exceptions to be well taken, and order that a new bond, in the sum of \$——, be given by said guardian within — days.

693. (Sec. 6261.) *Order for new bond, made by court on its own motion.*

[*Title.*]

It appearing to the court that the bond of C. M., guardian of D. M., a minor, is insufficient, by reason of [*state cause*], it is now ordered that said guardian give a new bond, in the sum of \$——, within — days.

694. *New bond of guardian given.*

[*Title.*]

This day came the said C. M., guardian of D. M., a minor, and presented to the court a new bond as such guardian, in the sum of — dollars, with C. H. and T. G. as sureties, which bond is approved by the court and ordered filed.

695. (Sec. 6268.) *Bond subsequently required of guardian who is relieved by will from giving bond.*

[*Title.*]

On motion of —, and for good cause shown, it is now ordered that C. M., as guardian of D. M., a minor, give bond, in the sum of \$—, within — days.

Sec. 6269. The notices to guardians provided for in this section may be by citation, issued by the probate judge, either with or without a journal entry therefor.

696. (Sec. 6269.) *Guardian removed for failing to file inventory.*

[*Title.*]

C. M., guardian of D. M., a minor, having failed to file an inventory, as required by law, due notice having been given him, he is hereby removed from such guardianship.

[*If another guardian is immediately appointed, continue as in one of the forms above making the appointment.*]

Sec. 6269. *Accounts of guardians.* It is the guardian's duty to render on oath to the proper court an account of his receipts and expenditures, verified by vouchers or proof, once in every two years, or oftener, if ordered by the court.

The journal entries to be made may be as follows:

Account current filed and suspended. Use form of Entry No. 649, page 337.

Final account filed and suspended. Use form of Entry No. 650, page 337.

Notice of filing accounts ordered. Modify Entry No. 775.

Publication of notice approved. Modify Entry No. 776.

Suspended account allowed and confirmed. Use form of Entries Nos. 651-3, page 337.

Accounts confirmed on exceptions heard. Use form of Entry No. 654, page 339.

Account disallowed. Use form of Entry No. 655, page 339.

Exceptions withdrawn. Use form of Entry No. 656, page 339.

697. (Sec. 6269.) *Order for special account.*

[*Title.*]

On motion of —, and for good cause shown, viz. [*state*

cause], it is ordered that C. M., guardian of D. M., a minor, render to this court, within — days, an account of his guardianship since his last report.

Sec. 6269. *Loaning and investing ward's money.* Although the guardian is not required by statute to obtain an order of court authorizing the investment, it is always better that such order should be made. It may be made in the following form :

698. (Sec. 6269.) *Order authorizing guardian to loan money, etc.*

[*Title.*]

On application of the guardian herein, and the court being satisfied that it would be for the best interest of the said C. D., the said guardian is hereby authorized and directed to loan the sum of \$—, in his hands as such guardian, to S. H., at — per cent interest, for — years, on his giving his note therefor, secured by first mortgage on the following described real estate, viz. [*describe*].

Sec. 6272. An order of removal for any of the causes named in this section may be made in the form of Entry No. 696, above.

699. (Sec. 6273.) *Surety released, new bond ordered.*

[*Title.*]

Modify Entry No. 671.

700. (Sec. 6273.) *Guardian removed for failing to give new bond.*

[*Title.*]

Modify Entry No. 696.

701. (Sec. 6274.) *Resignation of guardian accepted.*

[*Title.*]

This day came the said C. M., guardian of D. M., a minor, and tendered his resignation to the court; and the court being fully advised in the premises, hereby accepts the same.

[*Entry may conclude with appointment of successor as in one of above entries, Nos. 686–8.*]

Sec. 6275. Orders enforcing return of inventories, accounts, etc., may be made in form as given in entries relating to executors and administrators, Nos. 590-2.

702. (Sec. 6277.) *Guardian removed, on removal of ward to another state.*

[*Title.*]

This day came T. P., and having heretofore filed in this court an exemplified record from the court of Indianapolis, Indiana, as required by law, showing his appointment by said court as guardian of D. M., a minor, now a resident of said city of Indianapolis, together with a copy of his bond and letters of guardianship, all duly authenticated, and made application * for the removal of C. M., the guardian appointed by this court for the said D. M., while a resident of this county, and for the settlement of his account. And thereupon, due legal notice having been served upon the said C. M., and the court being satisfied that such removal would be to the interest of said ward, it is therefore ordered that the said C. M. be removed from his said guardianship.

It is further ordered that the said C. M. pay over and deliver to the said T. P. all moneys and other property in his hands belonging to the estate of his said ward, and thereupon be discharged from all further liability as such guardian.¹

703. (Sec. 6279.) *Foreign guardian authorized to receive money from executor or administrator.*

[*Title.*]

As in last entry to *, and continue:—for permission to demand and receive certain moneys [*or other property*] in the hands of E. T., executor of the estate of G. M., belonging to the said ward, and the court being satisfied that he is entitled thereto, it is thereupon ordered that said T. P. be permitted and fully authorized as such guardian to demand and receive said money [*or other property*], and remove the same from the jurisdiction of this court.

A similar order may be made for the other cases named in sec. 6279.

¹ See sec. 6278.

SALE OF REAL ESTATE BY GUARDIAN—

704. (Sec. 6282.) *Notice to defendant, of petition to sell real estate, ordered.*

[*Title.*]

Upon reading the petition herein, it is ordered by the court that the plaintiff cause notice to be served on the defendant [*or, defendants*] by the sheriff of this county [*or otherwise as the court may deem best*], of the filing of said petition and the object and demand thereof, and that the same will be for hearing on the ——day of ——, 18—, at —— o'clock A. M.

For entry appointing guardian *ad litem*, see Entries Nos. 10 and 11, page 18. While there is no provision in this chapter requiring it, many attorneys prefer that a guardian *ad litem* should be appointed.

705. (Sec. 6283.) *Order for appraisement of real estate when there is no dower interest.*

[*Title.*]

This cause being heard this day upon the petition [*name any other pleadings*] and the testimony offered, and the court being satisfied that the notice, as heretofore ordered, has been served upon the defendant [*or, defendants*], the court find that, as set out in said petition, the real estate therein described [*or specifically name any part of it*] ought to be sold to pay the debts of the said defendant, C. D. [*or for other cause named in sec. 6280*]. *

[*If the property is to be subdivided, here order as follows:—* And it being further shown to the court that it will be to the advantage of the ward to have said land laid out into lots, it is therefore ordered that the petitioner cause the same to be done, subdividing the same into lots of such size and laying out such streets as he shall deem best for said estate, and return a plat thereof to this court. And he is hereby authorized to employ some competent surveyor to lay out and plat said land.] [†]

And it is therefore ordered and adjudged that [after such subdivision] said real estate [*or, lots so laid out*] be appraised by the oaths of T. K., H. F., and J. H., freeholders of the

county, not of kin to the petitioner, whom the court hereby appoint for that purpose, and that they return their appraisement to this court without unnecessary delay.

706. (Sec. 6283.) *Order for appraisement in case widow has waived dower by metes and bounds.*¹

[Title.]

As in last to *, or, if property is to be subdivided, to [†], and continue:]—

And L. D., widow of M. D., having by her answer waived the assignment of her dower by metes and bounds,¹ it is ordered and adjudged that [after such subdivision], said real estate [or, lots so laid out] be appraised, free from the dower interest of the said L. D., by the oaths of T. K., H. F., and J. H., freeholders of this county, not of kin to the petitioner, whom the court hereby appoint for that purpose, and that they return their appraisement to this court.

707. (Sec. 6283.) *Order for appraisement in case there is a dower interest, which the appraisement does not set off, but subject to which the appraisement is made.*

[Title.]

As in No. 705 to *, or, if the property is to be subdivided, to [†], and continue:]—

And it is ordered and adjudged that [after such subdivision] said real estate [or, lots so laid out] be appraised, subject to the dower interest of the said L. D., by the oaths of T. K., H. F., and J. H., freeholders of the county, not of kin to the petitioner, whom the court hereby appoint for that purpose, and that they return their appraisement to this court without unnecessary delay.

In case there is a widow entitled to dower in the property, who has not waived its assignment under sec. 5719, there is no provision authorizing the appraisers appointed under this chapter to assign it, as there is under the law relating to executors and administrators, by sec. 6155. But it may be that sec. 525, which gives to the probate court concurrent jurisdiction in the assignment of dower in case of sales by

¹ By sec. 5719.

executors and guardians, is sufficient to authorize the court to have such dower assigned by the appraisers without the widow's petition therefor. But if not, there appears to be no reason why the widow may not by answer and cross-petition ask for the assignment of dower, and then the action be carried on for the double purpose of selling the ward's real estate and assigning the widow's dower, decrees being modified accordingly. If this view is correct, make decree as follows :

708. (Sec. 6283.) *Order for assignment of dower and appraisal of premises.*

[*Title.*]

*As in No. 705 to *, or, if the property is to be subdivided, to [†], and continue:—*

And it appearing to the court that L. D., the widow of M. D., deceased, is entitled to dower in said premises, as set up in her answer and cross-petition, it is ordered that T. K., H. F., and J. H., judicious and disinterested freeholders of the vicinity, residents of said county, who are not of kin to the petitioner, after being duly sworn, set off and assign the same, and also, upon the same oath, appraise said real estate, subject to such dower so assigned, and that they return their proceedings to this court.

709. (Sec. 6285.) *Bond of guardian ordered and approved.*

[*Title.*]

The appraisers heretofore appointed by this court in this case having filed their appraisement of the real estate, as heretofore ordered, aggregating the sum of \$——, it is ordered that C. B., the petitioner herein, guardian of the said L. P., execute a bond, as required by sec. 6285 of the Revised Statutes, in the sum of \$——.

And now the said C. B. presents his bond as aforesaid, with J. D. and L. E. as sureties, to the approval of the court.

The decree for sale may be entered at any time after the last entry is made. If the decree is to be entered at once the following form of bond approved and order for sale may be made, instead of making separate entry as last.

710. (Sec. 6286.) *Bond of guardian approved, and decree for sale.*

[Title.]

The appraisers heretofore appointed by this court in this case having filed their appraisement of the real estate, as heretofore directed [free of dower], in the sum of \$—, and the said C. B. having filed his bond, conditioned according to law, in the sum of \$—, with J. D. and L. E. as sureties, which bond the court approves, * it is ordered that said C. B., guardian of C. D., proceed to sell the real estate aforesaid [subject to, *or*, free from the dower interest of the said L. D.] for not less than two-thirds of its appraised value, and on the following terms, to wit, one-third cash, one-third in one year, and one-third in two years from day of sale; deferred payments to bear interest at the rate of — per cent per annum, and to be secured by mortgage on the premises [*or name other terms*]; and that said sale be made by public auction, on the premises, after giving notice by publication in the Cincinnati Daily *Gazette* of the time and place thereof, for — consecutive weeks [*or make other order as to advertisement and place of sale*]. And it is ordered that said guardian make due return of his proceedings and sale to this court without unnecessary delay.

711. (Sec. 6286.) *Assignment of dower by metes and bounds confirmed, and decree for sale.*

[Title.]

This cause came on this day to be heard on the return of the appraisers heretofore appointed by the court in this case of their proceedings in the assignment of dower, and appraisement of premises subject to such dower, under the former order of this court, and the court being fully advised, find said proceedings in all respects in conformity to law, and do hereby approve and confirm the same. And it appearing that the dower of the said L. D. has been assigned by metes and bounds, it is therefore adjudged that she have and hold in severalty the lands so assigned to her, to wit [*describe*], as and for her dower in said premises. And the said C. B. having filed his bond, conditioned according to law, in the sum

of \$——, with J. D. and L. E. as sureties, which bond the court approve * [*conclude as from * in Entry No. 710*].

712. (Sec. 6286.) *Assignment of dower as of rents and profits confirmed, and decree for sale.*

[*Title.*]

This cause came on this day to be heard on the return of the appraisers heretofore appointed by the court in this case of their proceedings in the assignment of dower, and appraisement of premises subject to such dower, under the former order of the court, and the court being fully advised, find said proceedings in all respects in conformity with law, and do hereby approve and confirm the same. And it appearing that said dower has been assigned, as of the rents and profits, in the annual sum of \$——, it is therefore adjudged that the said L. D. stand so endowed in said annual sum of \$——, and the said premises are hereby charged with the payment of the same on the —— day of —— of each and every year of the natural life of the said L. D. And in default of payment thereof an execution is hereby allowed therefor, against said lands as after judgments at law. And the said C. B. having filed his bond, conditioned according to law, in the sum of \$——, with J. D. and L. E. as sureties, which bond is approved by the court * [*conclude as from * in Entry No. 710*].

713. (Sec. 6286.) *Order for private sale.*

[*Title.*]

*As in No. 710, or No. 711, or No. 712, according to circumstances, to *, and continue:*]—and it appearing to the court that it would be more to the interest of said estate to sell the said real estate at private sale, [†] it is therefore ordered and decreed by the court, that the said guardian proceed to sell the real estate described in the petition [subject to, or, free from the dower interest of the said ——], according to law, at private sale, for not less than its appraised value, and upon the following terms, to wit [*name terms*], and that he report his proceedings hereunder immediately after such sale is made.

714. (Sec. 6286.) *Order for private sale, on report of offer made.*
 [Title.]
Modity Entry No. 643.

715. (Sec. 6287.) *Sale confirmed, and deed ordered.*
 [Title.]

This cause now being heard on the return of C. B., guardian of L. P., a minor, of his proceedings and sale under the order of this court, and on the motion to confirm the same, the court, after carefully examining said return, and being satisfied that such sale was fairly and legally made, does hereby approve and confirm the same, and order that, upon the deferred payments of purchase-money being properly secured, the said C. B., guardian, make to the purchaser, L. M., a good and sufficient deed for the premises so sold. * And it is ordered that, after paying the costs of this proceeding, taxed at \$——, the balance of the proceeds of sale be applied by the guardian according to law.

716. (Sec. 6287.) *Same, when widow has waived dower by metes and bounds.*

[Title.]

*As in last to *, and continue :]*—

And the said L. D. having by her answer in this case elected to receive in lieu of her dower its value in money, the court find the just and reasonable value thereof to be —— dollars.

It is therefore ordered that, after payment of the costs herein, taxed at \$——, the said guardian pay to said L. D. the said sum of \$——, in full of her dower interest. Leaving in the hands of the guardian a balance of \$——, to be applied by him as by law required.

LEASING OF REAL ESTATE—

Sec. 6298. The order for notice of petition filed by guardian will be the same as Entry No. 704.

717. (Sec. 6298.) *Freeholders appointed to report on guardian's application to lease real estate.*

[*Title.*]

On hearing of the petition of C. B., guardian of L. P., a minor, for permission to lease certain real estate, as described in said petition, belonging to his ward, the court hereby appoints E. S., E. D., and J. G., three disinterested freeholders of this county, not of kin to the petitioner, to view the said premises, and report, under oath, their opinion of the probable cost of the improvements proposed by said guardian, and whether or not the lease proposed by him would be for the best interest of his ward, and upon what terms the lease should be made: said report to be returned on or before the — day of —, 18—, which day the court appoints for the final hearing of the case.

718. (Sec. 6299.) *Order for guardian to lease.*

[*Title.*]

On hearing of the petition herein, and of the report of the freeholders heretofore appointed to view the premises, and the court being satisfied that the notice has been duly served upon the ward of the petitioner, and being satisfied that the lease proposed would be to the advantage of the said ward, and is necessary to secure the improvement of the real estate and to increase its rents, which increase is needed for the support and education of said ward [*or other purpose named in section*], the court therefore authorizes and empowers the said guardian to make said lease, to wit, a lease for — years to J. R., at an annual rent of \$— [*state terms fully*], of the following described real estate, to wit [*describe*].

And the court further directs that the improvements to be made shall be made [*state by whom and how, as provided in sec. 6300*].

OF LUNATICS, IDIOTS, AND IMBECILES—

719. (Sec. 6302.) *Letters of guardianship granted.*

[*Title.*]

Upon application, and the court being satisfied that J. L., a resident of this county, is an idiot [*or, an imbecile; or, a*

lunatic], and incapable of managing his affairs, C. M. is hereby appointed guardian of the person and estate [*or either*] of said J. L., and letters of guardianship are granted accordingly.

[*Conclude as from * in Entry No. 686.*]

Other orders relating to these guardians may be made as in case of guardians for minors, by virtue of sec. 6304.

Sec. 6306. Proceedings for sale are the same as in case of guardian for minor. If the idiot, imbecile, or lunatic has a wife who files her answer consenting to a sale free of dower, and the court fix the value of her dower interest, the order for appraisement may be in the form of Entry No. 706, and the decree of sale in the form of Entry No. 710, and the decree of confirmation in the form of Entry No. 716. But in each of these cases use the words "right and expectancy of dower," instead of "dower interest."

720. (Sec. 6307.) *Sale of dower right by guardian, approved.*
[*Title.*]

And now comes C. B., guardian of L. M., and represents to the court that his ward has a right of dower in the following lands, to wit [*describe*], and has an offer of \$—— for the said dower right. And the court being of opinion that the price is a fair one, hereby approves the sale, for said sum, and authorizes the said guardian to make the same.

Sec. 6308. For entries in proceedings to lease, modify Nos. 717 and 718.

Sec. 6309. For entries in proceedings to make long lease, etc., modify Entries No. 704, and those following relating to sales.

Sec. 6312. For entry directing lease, modify Entry No. 718.

Sec. 6313. For decree ordering guardian to complete real contract of ward or previous guardian, modify Entry No. 471, page 258, the order for additional bond being added to decree.

Judgment to compel completion of such real contract in favor of such guardian may be made by adapting decree No. 472, page 259.

721. (Sec. 6315.) *Foreign guardian authorized to act as guardian in county.*

[*Title.*]

An authenticated copy of a commission of lunacy [*or, idiocy*] on C. P., a resident of Dearborn county, Indiana, was

this day presented to this court for record by C. B., guardian of said C. P., who was appointed by the — court of said Dearborn county. Whereupon, the court being satisfied, on said examination, that said commission was duly issued by said court, the said copy is hereby admitted to record in this court, to be recorded according to law.

And thereupon said guardian further presented evidence, satisfactory to the court, that said lunacy [*or*, idiocy] still continues, and filed his bond, as provided by law, in the sum of \$—, with L. E. and J. D. as sureties to the approval of the court, and is now therefore authorized to possess, manage, and dispose of, the real and personal estate of the said C. P., situate in this state, with like powers as if appointed guardian by this court.

722. (Sec. 6316.) *Entry of termination of guardianship.*

[*Title.*]

Satisfactory proof being made that C. M. is restored to reason, it is hereby directed that the guardianship as to him, heretofore granted by this court, terminate.

OF DRUNKARDS—

Sec. 6317. Laws relating to guardians for lunatics, idiots, and imbeciles and their wards, are applicable to drunkards, and similar entries may be made in relation to drunkards.

723. (Sec. 6319.) *Order that guardianship cease.*

[*Title.*]

Proper notice having been given of the hearing of this application, and satisfactory proof being made that the necessity for a guardian for the said E. S. no longer exists, it is now ordered that such relation between the said E. S. and C. M., heretofore appointed as his guardian, cease; and the said E. S. is hereby restored to the full control of his property, as before the appointment.

TRUSTEES OF NON-RESIDENTS—

724. (Sec. 6320.) *Order appointing trustee for non-resident minor, idiot, lunatic, or imbecile.*

[*Title.*]

Upon application, and it appearing to the court that J.

L., who is a minor [*or, idiot, &c.*], and a resident of Indianapolis, Indiana, is the owner of certain property in this county, consisting of [*name property generally*], C. M. is hereby appointed trustee of such minor [*or, idiot, &c.*], to manage and take care of all of the property belonging to him situated in this state.

[*Conclude as from * in Entry No. 686.*]

Sec. 6323. See entries relating to guardians of minors.

725. (Sec. 6325.) *Order that trustee pay over money to foreign guardian, &c.*

[*Title.*]

On hearing of the petition [*or, motion*] filed herein by J. K., guardian under the laws of Indiana, of J. L., a minor [*or, idiot, &c.*], and due notice of the same having been given to the trustee of said J. L., and the court being satisfied, on examination of the exemplified copies of the entries made by the — court of — county, Indiana, in relation to the appointment of said guardian, which were by him produced to the court, that the said J. K. has authority to receive the money applied for, and that his bond is sufficient to protect the interest of said minor [*or, idiot, &c.*], it is hereby ordered that C. M., trustee of said minor [*or, idiot, &c.*], pay over to the said J. K. the money in his hands remaining [*or any part of it*], belonging to the estate of said J. L., after payment of all proper charges and expenses connected with his trusteeship.

TRUSTEES, GENERALLY, AND THEIR ACCOUNTING—

Secs. 6328-34. Entries may be made similar to entries relating to executors or administrators, as the same laws govern.

CHAPTER IV.

INSOLVENT DEBTORS.

VOLUNTARY ASSIGNMENTS—

- 727. (Sec. 6335.) Deed of assignment filed.
- 728. (Sec. 6335.) Bond of assignee filed and approved.
- 729. (Sec. 6335.) Order that assignee give additional undertaking.
- 730. (Sec. 6336.) Assignee removed for failing to file deed, or give bond, etc.
- 731. (Sec. 6336.) One of two assignees allowed to act, on other one failing to qualify.
- 732. (Sec. 6337.) Resignation of assignee accepted, etc.
- 733. (Sec. 6337.) Same—and remaining one allowed to execute trust.
- 734. (Sec. 6337.) Trustee appointed after death, resignation, or removal of assignee.
- 735. (Sec. 6337.) Additional trustee appointed.
- 736. (Sec. 6338.) Day fixed for election of trustee.
- 737. (Sec. 6338.) Trustee chosen by creditors approved and appointed.
- 738. (Sec. 6339.) Order for removal of assignee.
- 739. (Sec. 6339.) Order on application of surety that assignee give new bond.
- 740. (Sec. 6339.) Assignee removed for failing to give new bond.
- 741. (Sec. 6344.) Conveyance declared void, and trust administered in the common pleas.
- 742. (Sec. 6344.) Conveyance declared void in common pleas, and judgment certified to the probate court.
- 743. (Sec. 6344.) Trustee appointed by probate court, etc.
- 744. (Sec. 6344.) Conveyance to defraud creditors declared void, and judgment certified to probate court—no notice having been given.
- 745. (Sec. 6347.) Appraisers of assets of assignor appointed.
- 746. (Sec. 6348.) Order that homestead exemption be set off.
- 747. (Sec. 6349.) Order that assignor attend for examination.
- 748. (Sec. 6350.) Order for sale of real estate.
- 749. (Sec. 6350.) Order for private sale.
- 749a. (Sec. 6350.) Decree of confirmation and distribution.
- 750. (Sec. 6350.) Completion of sale made by assignor approved and ordered.
- 751. (Sec. 6350.) Judgment for enforcement of contract for sale made by assignor.
- 752. (Sec. 6350.) Order for sale of personal property in usual course of business.
- 753. (Sec. 6351.) Decree, in the common pleas, for sale of real estate by assignee.

754. (Sec. 6352.) Judgment for allowance of rejected claim.
755. (Sec. 6353.) Order, on bond filed, that claim be disallowed.
756. (Sec. 6356.) Account filed, and day fixed for hearing.
757. (Sec. 6356.) Order declaring dividend.
758. (Sec. 6356.) Order for payment of further dividend.
759. Order for payment of claim on which no dividend has been paid.
760. (Sec. 6357.) Extra compensation and attorney's fees allowed, and dividend ordered.
761. (Sec. 6357.) Counsel fee allowed.
762. Order for re-assignment on compromise effected.
763. Deed of assignment stricken from files.

ASSIGNMENTS TO AVOID ARREST—

764. (Sec. 6359.) Commissioner of insolvents appointed.
765. (Sec. 6367.) Order that debtor enter into recognizance.
766. (Sec. 6367.) Recognizance filed and approved.
767. (Sec. 6372.) Day set for creditors to appear.
768. (Sec. 6372.) Certificate granted to debtor of compliance with insolvent laws, when no creditor resists.
769. (Sec. 6373.) Case continued on application of creditor.
770. (Sec. 6376.) Certificate granted on final hearing.
771. (Sec. 6376.) Petition dismissed on final hearing.
772. (Sec. 6378.) Petition dismissed on default for petition.

VOLUNTARY ASSIGNMENTS—

727. (Sec. 6335.) *Deed of assignment filed.*

[*Title.*]

A deed of assignment, for the benefit of creditors, executed by J. E., doing business as J. E. & Co., to H. L., was this day, at 1:10 o'clock p. m., filed in this court.

728. (Sec. 6335.) *Bond of assignee filed and approved.*

[*Title.*]

This day came H. L., and presented to the court his bond as assignee of J. E., * conditioned according to law, in the sum of \$—, with T. S. and W. A. as sureties, which is approved by the court. And the court appoint E. S., E. D., and A. R., three suitable disinterested persons, as appraisers of the property and the assets of the assignor.¹

¹ By sec. 6347. May be appointed at this time, or subsequently, by a separate entry. See Entry No. 745.

729. (Sec. 6335.) *Order that assignee give additional undertaking.*

[*Title.*]

On motion of——, and it appearing to the court that the bond of H. L. is insufficient, it is ordered that an additional undertaking be given by the said assignee, in the sum of \$——.

730. (Sec. 6336.) *Assignee removed for failing to file deed, or give bond, and trustee appointed.*

[*Title.*]

On application of ——, and it appearing to the court that a deed of assignment for the benefit of creditors was made more than ten days ago by A. S. to R. S., and that such deed has not been filed in this court [*or, that the said assignee has failed to give bond*], it is now therefore ordered by the court that the said R. S., as such trustee, be removed, and that E. W. be, and he hereby is, appointed trustee in place of said R. S. [*and his bond is fixed at \$——*].

[*If bond is given at once, a clause to that effect may be added to this entry, similar to Entry No. 732. So also any order under sec. 6340, for the delivery of property, may be added.*]

731. (Sec. 6336.) *One of two assignees allowed to act, on other one failing to qualify.*

[*Title.*]

It appearing to the court that a deed of assignment for the benefit of creditors was made more than ten days ago by A. S. to R. S. and A. J., and that the said R. S. has failed to give bond, it is now therefore, on application, ordered by the court that the said R. S. be removed as such assignee, and that A. J., the remaining assignee, having duly qualified as such, be allowed to enter alone upon the discharge of his duties.

732. (Sec. 6337.) *Resignation of assignee accepted, and trustee appointed.*

[*Title.*]

This day came the said R. S., assignee of A. S., and ten-

dered his resignation to the court : and the court being advised in the premises, accepts the same. *

And E. W. is hereby appointed trustee in the place of the said R. S.

And thereupon comes the said E. W., and presents his bond as such trustee, conditioned according to law, in the sum of \$——, with L. E. and J. D. as sureties, which is approved by the court.

733. (Sec. 6337.) *Resignation of one assignee accepted, and remaining one allowed to execute trust.*

[Title.]

*As in last to *, and continue :—*

And, it being for the best interest of the estate, it is further ordered that J. A., the remaining assignee, be allowed to execute the trust alone.

734. (Sec. 6337.) *Trustee appointed after death, removal, or resignation of assignee.*

[Title.]

It appearing to the court that R. S., the former assignee of A. S., has died [*or, resigned : or, been removed from his trust*], now, on application, W. R. W. is hereby appointed trustee in the place of the said R. S.

And thereupon comes the said W. R. W. and presents his bond as such trustee, conditioned according to law, in the sum of \$——, with J. E. and T. S. as sureties, which is approved by the court.

735. (Sec. 6337.) *Additional trustee appointed.*

[Title.]

This day an application was presented by certain creditors of A. S., the assignee herein, for the appointment of an additional trustee. And the court being satisfied that such application is signed by a majority of the creditors in amount, and that good cause exists for such appointment, hereby appoints R. W. as such additional trustee of the said A. S., and fix his bond at \$——.

[*If bond is at once given, add clause as after No. 732.*]

736. (Sec. 6338.) *Day fixed for election of trustee.*

[*Title.*]

On petition presented and filed with the court, signed by creditors of C. M., the assignor herein, as required by law, praying permission to elect a trustee to execute the trust, in place of the assignee of the said C. M., the court being satisfied that the said creditors own not less than one thousand dollars of the debts of the said C. M., fix Monday, the — of day —, 18—, for such election, and direct that notices be sent accordingly, by mail [*or specify other means*], to all the creditors of the assignor aforesaid.

737. (Sec. 6338.) *Trustee, chosen by creditors, approved and appointed.*

[*Title.*]

This day came W. C., and tendered to the court his bond as trustee of the creditors of A. S., with J. D. and L. E. as sureties. And it appearing from the record of proceedings of a meeting heretofore held by the creditors of said A. S., duly made and signed and filed in this court, that the said W. C. was elected by said creditors in due form of law, the court do hereby approve said choice; and the said W. C. is hereby appointed trustee of the said A. S. in place of R. S., to whom the assignment was made, who is hereby removed from such trust. And the bond of the said W. C. is hereby approved.

738. (Sec. 6339.) *Order for removal of assignee or trustee.*

[*Title.*]

Use form of Entry No. 730, above.

739. (Sec. 6339.) *Order, on application of surety, that assignee give new bond.*

[*Title.*]

Application having been made by W. C., one of the sureties on the bond of H. L., as assignee of J. E., to be released therefrom, and the court being satisfied of the reasonableness of such request, after full hearing of the case, order that

said H. L. give a new bond as such assignee, with sufficient sureties, within — days, and that thereupon his former sureties be released from further liability.

740. (Sec. 6339.) *Assignee removed for failing to give new bond.*
[Title.]

Modify Entry No. 730.

Sec. 6344. Conveyances to defraud creditors may by this section be declared void at the suit of any creditor, whether he has reduced his claim to judgment or not;¹ and, being so declared, the estate will be administered for the benefit of creditors by the court in which the suit is brought, or by the probate court, as follows:

Where notice of the suit is given as provided by sec. 6344, the court of common pleas declaring the conveyance void may administer the trust both as to the creditors who are parties as aforesaid, and as to those who have not come in and been so made parties;² or may certify the judgment to the probate court. No method of administering this trust by the common pleas is pointed out, but most likely this court should, in this, follow the method prescribed for the probate court; that is, appoint a trustee, who shall have the same powers as if appointed by the probate court, as prescribed in this chapter. This seems to be the only method reaching the creditors who are not parties to the suit.

If this view is correct, make the entry as follows:

741. (Sec. 6344.) *Conveyance declared void, and trust administered in the common pleas court by decree for sale.*

[Title.]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:]—And the court further find that the conveyance of the property described in the petition was made with intent to hinder, delay, and defraud creditors, as the said plaintiff has in his petition alleged.

It is therefore ordered and adjudged by the court that the said deed of conveyance from R. M. to C. D., of the following real estate, to wit [*describe*], be, and the same is hereby,

¹ Sec. 6344. See also *Combs v. Watson*, 32 O. S. 228.

² Sec. 6344.

declared void, and to be of no force or effect in law to affect the title of the said premises, or to convey the same to the said C. D. [†]

And the court further find that notice of the pendency and object of this suit was duly published by the plaintiff, for notification of the creditors of the said R. M., and that E. F. and G. H. have filed answers in this case, and have otherwise complied with the law, as creditors desiring to share in the benefits of this action, and it is therefore adjudged by the court that the property in the petition described be subjected to the payment of the debts due to the plaintiff and the other creditors above named, from the said R. M.; and for that purpose * D. W. S. is hereby appointed trustee, with full power allowed by the statute in such cases, to take possession of said premises, and to sell the same and administer the proceeds for the benefit of creditors.

And it is ordered that the said D. W. S., before entering upon his duties, give bond to the State of Ohio in the sum of \$—, to the approval of the court, conditioned for the faithful performance of his duties as such trustee.

And thereupon comes the said D. W. S., and as trustee as aforesaid presents his said bond, with C. W. and T. S. as sureties, to the approval of the court.¹

This trustee will proceed, as a trustee appointed by the probate court, to recover possession, by action if necessary, of the real estate so fraudulently conveyed, and then to sell the same and distribute proceeds under direction of the common pleas court.

The entries will be so similar to entries of sale, confirmation, etc., in case of sale on foreclosure of mortgage, that separate entries will not be given here.

742. (Sec. 6344.) *Conveyance declared void by the common pleas court, and judgment certified to the probate court.*

[Title.]

*As in last to **, and continue:—it is ordered by the court

¹ This clause approving bond may of course be made as a separate entry.

that a copy of this judgment be certified to the probate court of —, Ohio, for the appointment of a trustee and further proceedings in administering the property assigned as aforesaid.

[*Add any order as to costs.*]

On the certified copy of the above judgment being filed in the probate court, a trustee will be appointed under sec. 6344. Entry may be as follows :

743. (Sec. 6344.) *Trustee appointed by probate court, on certified copy of last judgment being filed.*

[*Title.*]

A certified copy of a judgment entered by the court of common pleas of — county, Ohio, was this day filed in this court; and it appearing therefrom that said court has declared void a conveyance made by R. M. to C. D. of the following described real estate, to wit [*describe*]. And ordered that the same be subjected to the payment of the debts due the plaintiff and other creditors from the said R. M.; thereupon [*conclude as from * in Entry No. 741*].

The trustee appointed as above will act under the laws relating to assignees of insolvent debtors in the probate court, in the sale of property and distribution of proceeds.

In case notice of suit is not given, under sec. 6344.

If notice is not given as provided by sec. 6344, the judgment declaring the conveyance void must be certified to the probate court for the appointment of trustees. Make entry as follows :

744. (Sec. 6344.) *Conveyance declared void by common pleas, and judgment certified to probate court.*

[*Title.*]

As in decree No. 741 to [†], and continue:—

And it appearing that no notice of the pendency and object of this suit was published, for notification of other creditors, it is ordered that a copy of this judgment be certified to the probate court of — county, for the appointment of a trustee, and further proceedings in administering the property as aforesaid.

[*Add order as to costs.*]

The entry appointing trustee, in the probate court, may be the same as No. 743, and the trustee will act as the trustee appointed in case of notice given.

745. (Sec. 6347.) *Appraisers of assets of assignor appointed.*¹
[Title.]

The court hereby appoint T. N., E. B., and E. M., suitable and disinterested persons, appraisers of the assets of the assignor above named.

746. (Sec. 6348.) *Order that homestead exemption be set off.*
[Title.]

It appearing to the court that the appraisers herein have failed to set off a homestead exemption to the assignor, the court order that the same be done by said appraisers forthwith. [Or say, the court hereby appoint L. D., J. M., and T. S. as appraisers to set off and assign the same.]

747. (Sec. 6349.) *Order that assignor attend for examination.*
[Title.]

Now comes —, and applies for an order for the examination of the assignor herein; and the court order that F. H. be appointed referee, and that C. N., the assignor, be ordered to appear before said F. H., referee, at his office, No. —, — street, on the — day of —, 18—, for such examination.

Sec. 6349. Orders to prevent any fraudulent transfer of property may be made in form similar to orders of the same kind to be found in other proceedings.

The real estate of an insolvent debtor may be sold under proceedings in the probate court, or, in certain cases as provided by sec. 6351 (amended 82 O. L. 14), proceedings for sale may be instituted by the assignee in the court of common pleas.

¹If appointed when bond is filed, see entry No. 728.

In the probate court the assignee or trustee appears to have power to sell without a special order in the same manner as in case of personal property, but it is better for him to obtain a decree of court, so that no question may arise upon the title.

748. (6350, 77 O. L. 189.) *Order for sale of real estate.*
[*Title.*]

C. N., the assignee herein, having made application for an order to sell the [*or, certain of the*] real estate included in the assignment to him, and having presented to the court the return of the appraisers heretofore appointed, the court now, upon examination, find said appraisement in all respects regular, and according to law, and do thereupon approve the same, * and authorize the assignee to sell said real estate, according to law, at public auction on the premises [*or any other place designated*], for cash [*or other terms designated*].

If the wife has asked that the real estate be sold free of her contingent dower, say :

And E. D., the wife of the assignor, having filed her answer asking therefor, it is ordered that said real estate be sold free of her contingent right of dower.

If the wife has joined with her husband in a mortgage of the real estate, say :

And E. D., the wife of the assignor, having joined with her husband in a mortgage of the said real estate, it is ordered that it be sold free from her contingent right of dower.

If the assignor has mortgaged the real estate for payment of purchase money, say :

And the assignor having executed a mortgage of said real estate to secure the payment of the purchase money, it is ordered that it be sold free from the contingent right of dower of E. D., wife of the said assignor.

And it is ordered that the assignee make return of his proceedings to this court.

Sec. 6350. For orders for re-appraisement, make entries similar to entries Nos. 294 and 295, page 157.

749. (Sec. 6350, 77 O. L. 189.) *Order for private sale of real estate.*

[*Title.*]

It being shown to the court that it would be to the advantage of the creditors, the assignee is ordered to sell the real estate of the assignor at private sale for not less than two-thirds of its appraised value, and on the following terms, to wit, [*name terms*]; and to make return of his proceedings within — days.

749a. (Sec. 6350, 77 O. L. 189.) *Decree of confirmation and distribution.*

[*Title.*]

This cause coming on for hearing upon the return of C. N., the assignee, of his proceedings and sale of real estate, the court after careful examination being satisfied that the sale has in all respects been legally made, does hereby approve and confirm the same and order that the said C. N., as such assignee, make to the purchaser, L. M., a good and sufficient deed of the premises so sold free from all liens for all debts due by the assignor (and from the contingent dower interest of E. D., the wife of the assignor).

And the court coming now to distribute the proceeds of the sale, amounting to \$—, find that the mortgage of P. L. is the first lien on the premises sold and that there is due thereon the sum of \$—. And the court find that the just and reasonable value of the contingent dower interest of the said E. D. in said real estate, after the payment of the mortgage of P. L., hereafter mentioned, is — dollars.

It is therefore ordered that the assignee pay.

First, the costs of the proceeding, taxed at \$——.

Secondly, to the said P. L. the sum of \$——, and thirdly, to the said E. D. the sum of \$——, in lieu of her contingent dower interest, and that the balance of the proceeds, viz. \$——, remain in the hands of the assignee

750. (Sec. 6350.) *Completion, by assignee, of sale made by assignor approved and ordered.*

[*Title.*]

This cause being this day heard on application of the assignee for the approval by the court of the completion of a certain contract for sale of real estate made by the assignor above named, and due notice of this hearing having been given to all parties in interest, the court find that A. S., the assignor, did, on the —— day of ——, 18—, enter into a [written] contract with C. F. for the sale and conveyance of the following described premises, to wit [*describe*]; and that [*here make finding of any payment or part performance of the contract*], ❖ and that there still remains due on said contract from C. F. the sum of \$——, and that he is ready and willing to complete the same.

It is therefore ordered and decreed that the said A. E., assignee, make and execute to the said C. F. a good and sufficient deed for the premises above described, and, upon the payment of the said sum of \$——, deliver the same to the said C. F.

And it is ordered that the said —— pay the costs of this proceeding.

751. (Sec. 6350.) *Judgment for enforcement of contract for sale made by assignor.*

[*Title.*]

As in last to ❖, and continue:—and that the assignee herein is entitled to the specific execution of the said contract.

It is therefore ordered and decreed that upon full payment being made by the plaintiff, assignee as aforesaid, [*or state specifically what he is to do*], the said C. F. do within — days from the date of this decree, convey the premises in the petition described to the plaintiff, as such assignee, by good and sufficient deed; and that in default thereof this decree have the same operation and effect as said deed.

[*Add order as to costs.*]

Orders for the private sale of personal property may be made similar to entry No. 748, and a sale for less than two-thirds of the appraised value may be ordered, for which modify entry No. 603.

For order that sale be at public auction, after personal property failing to sell at private sale, modify entry No. 604.

752. (Sec. 6350.) *Order that assignee sell personal property at private sale in usual course of business.*

[*Title.*]

On application of the assignee herein, and for good cause shown, it is ordered by the court that said assignee proceed to sell the goods assigned to him at private sale, in the usual course of business, at not less than two-thirds of the appraised value thereof, and continue until further order of court.

For order that the assignee compromise or sell desperate claims, modify entries Nos. 605–7.

753. (Sec. 6351, 82 O. L. 190.) *Decree, in common pleas court, for sale of real estate by assignee.*

[*Title.*]

And now this cause came on to be heard upon the petition of A. B., assignee of A. C. [*state pleadings or default according to facts, and continue:*] The court further find that the plaintiff, as assignee of A. C., as in his petition set fourth, is entitled

to have the real estate described in the petition sold, in this court, by reason of its being incumbered with various liens.

And the court find, upon the petition of the plaintiff and the cross-petition of the defendant, E. F., and the evidence, that the mortgage set up in the cross-petition of the said E. F. was duly executed and delivered to said E. F. by the said A. C. and M. C., his wife, and that the same was duly recorded in Book —, page —, of the Records of Mortgages of — county, and that it is the first and best lien on the premises in the petition described; and that there is due on said mortgage, with interest to the first day of this term, the sum of \$—.

And the court further find [*make findings, similar to last, upon each lien.*]

It is therefore ordered that said premises be appraised, advertised, and sold, as upon execution, free from all debts due from the assignor, and free from the contingent dower interest of the said E. D.,¹ and that an order of sale issue therefore to A. B., the assignee of A. C., and directing him to bring the proceeds of said sale into this court for further order.

The sale must be confirmed, the assignee ordered to make a deed, and the money be distributed as on foreclosure of a mortgage. For such decree, modify entry No. 749a.

754. (Sec. 6352.) *Judgment for allowance of rejected claim.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:—The court further find that the claim of the plaintiff against the estate of the said E. F. is just, and that he is entitled to have the same allowed in the sum of — dollars.

It is therefore considered and adjudged that the said de-

¹As to when this provision should be inserted see sec. 6350, 77 O. L. 189.

fendant, C. D., as assignee of the said E. F., allow the said claim of the plaintiff, as above found, in the settlement of his trusts.

It is further considered that the said — recover from the said — his costs herein expended, taxed at \$—.

755. (Sec. 6353.) *Order, on bond filed, that claim be disallowed*
[Title.]

This day came —, and filed in this court a written requisition on the assignee to disallow the claim of J. F., in the sum of — dollars, and also filed a bond to the assignee in the sum of — dollars, conditioned according to law in such cases, with J. N. and L. A. as sureties, which is approved by the court; and thereupon it is ordered by the court that the assignee disallow the said claim.

756. (Sec. 6356.) *Account filed, and day fixed for hearing.*
[Title.]

This day came the assignee, and filed his first [or other], partial [or, his final] account. And the court fix the — day of —, 18—, for hearing of the same.

Sec. 6356. For entry of account allowed, modify Entry No. 652 or 653.

For allowance after exceptions filed, modify Entry No. 654.

For account disallowed, modify Entry No. 655.

757. (Sec. 6356.) *Order declaring dividend.*
[Title.]

On motion of the assignee, and it appearing that he has in his hands for distribution among the unsecured creditors of H. S. & Co. the sum of \$—, and that the allowed claims of such creditors amount to \$—, it is ordered that the assignee declare and pay to said creditors a first [and final] dividend of — per cent. on the amount of their claims, respectively.

[If notice in addition to the usual way is ordered add it here.]

758. (Sec. 6356.) *Order for payment of further dividend.*
[Title.]

It is hereby ordered that C. R., assignee, declare and pay

a further dividend of two per cent on all claims which have been proved and allowed against the estate of the above-named assignors.

759. *Order for payment of claim on which no dividend has been paid.*

[*Title.*]

It appearing to the court that E. J. has presented a claim, duly verified, to the assignee, amounting to \$——, on which he has received no dividend, it is ordered that the assignee pay to the said E. J., on account of the same, any moneys in his hands, or that may come into his hands, not otherwise required, not exceeding the percentage paid to other creditors.

760. (See, 6357.) *Extra compensation and attorney's fee allowed, and dividend ordered.*

[*Title.*]

Upon application made by H. L., assignee, supported by his sworn statement on file, it is now ordered that he be, and hereby is, allowed the sum of —— dollars, as extra compensation for services as assignee, in addition to the statutory allowance for ordinary services.

It is further ordered that the sum of —— dollars be paid as counsel fee by said assignee [in addition to payments before made], as set forth in said affidavit, said payment to be in full for services to be rendered in the matter of said estate hereinafter.

Said assignee is now authorized and directed to declare and pay a final dividend of said estate, embracing the whole amount remaining in his hands after paying the costs of the assignment, said dividend to be declared within thirty days from this date.

761. (See, 6357.) *Counsel fee allowed in assignment case.*

[*Title.*]

This cause coming on for hearing upon the application of G. H., assignee, for allowance of \$——, to be paid to him as counsel fee, the court being fully advised, find that he is entitled thereto, and allow the said claim.

762. *Order for re-assignment on compromise effected.*

[Title.]

On motion, and it appearing to the court from the vouchers filed herein, and from the affidavit of the assignor, also filed herein, that the claims of all the creditors of said assignor have been fully satisfied by compromise or settlement, it is hereby ordered and directed that said assignee, F. W., re-assign and re-convey to said F. G. the property conveyed by the deed of assignment herein; and this entry, in default thereof, shall stand for and have the force and effect of such assignment.

763. *Deed of assignment stricken from files.*

[Title.]

This cause coming on to be heard on the citation against W. C., the assignee herein, to show by what authority he claimed to act as assignee of said F. W., and to show cause why the deed of assignment to him should not be stricken from the files, and it appearing to the court, from the evidence and proofs, that those who were creditors at the date of such assignment have been fully paid and satisfied, and that there are now no creditors who have any rights under said deed, and that said deed was wrongly filed, it is hereby ordered that said deed be stricken from the files of this court, and returned to said F. W.; and the bond filed by said W. C. is hereby canceled and ordered to be returned to him.

ASSIGNMENTS TO AVOID ARREST—

764. (Sec. 6359.) *Commissioner of insolvents appointed.*

In the matter of the appointment
of C. D. to be commissioner }
of insolvents. }

C. H. is hereby appointed commissioner of insolvents for this county, for the term of three years from the date of this entry, and his bond is fixed at \$—.

And now comes the said C. H., and presents his bond, conditioned according to law, in the sum of \$—, with L. E. and R. S. as sureties, to the approval of the court.

765. (Sec. 6367.) *Order that debtor enter into recognizance.*

[*Title.*]

On application, and good cause shown, it is ordered by the court that E. L., the petitioner herein, enter into a recognizance to the State of Ohio, with sufficient security, conditioned that he will appear at the proper time and prosecute his said petition, filed herein, and abide the order of the court thereon.

When the recognizance is filed, record its approval as follows:

766. (Sec. 6367.) *Recognizance filed and approved.*

[*Title.*]

Now comes E. L., and enters into recognizance, as required by the order of court in this case, with W. P. and C. W. as sureties, to the approval of the court.

767. (Sec. 6372.) *Day set for creditors to appear.*

[*Title.*]

Petition for relief under the law relating to insolvents being filed herein, the court set the same for hearing on the — day of —, 18—; at which time it is directed that the creditors of the said E. L. be called.

768. (Sec. 6372.) *Certificate granted to debtor of compliance with insolvent laws, when no creditor resists.*

[*Title.*]

This day the petition herein came on to be heard, and the court being satisfied that notice as required by law has been given of this application, and no cause [*or*, no sufficient cause] being shown to the contrary, the court * grant to the said E. L. the relief prayed for, and [upon his paying the costs herein adjudged]¹ a certificate of his having complied with the law relating to insolvents, and of his being released from liability to arrest on account of any debt or claim named in his schedule of debts.

¹ By sec. 6377.

And it is adjudged that the said petitioner pay the costs of this proceeding and the costs before the commissioners, and execution is awarded.¹

769. (Sec. 6373.) *Case continued on application of creditor.*

[*Title.*]

On calling this case for hearing, G. D., one of the creditors, desiring a further examination of the petitioner to be made, the case is continued for that purpose to the — day of —, 18—, at 10 o'clock A. M. And it is directed that such further examination be made, as provided by law, before the commissioner [*or other person named*], and that the petitioner attend at his office for that purpose on the — day of —, 18—.

770. (Sec. 6376.) *Certificate granted on final hearing.*

[*Title.*]

This cause came on for final hearing this day upon the petition, the written examination of the petitioner, read in evidence, and the testimony of witnesses. And on full consideration thereof the court * [*conclude as from * in Entry No. 768*].

771. (Sec. 6376.) *Petition dismissed on final hearing.*

[*Title.*]

*As in last to *, and conclude:*—dismiss the petition of the said E. L.: and it is adjudged that he pay all the costs herein that have accrued on his behalf.¹

772. (Sec. 6378.) *Application dismissed on default for petition.*

[*Title.*]

The applicant herein having failed to file his petition within the time required by law, his application to be released from liability to arrest under the law relating to insolvents is hereby dismissed, and it is adjudged that he pay the costs of this proceeding.

¹ By sec. 6377.

CHAPTER VII.

GENERAL PROVISIONS.

775. (Sec. 6402.) Notice of filing accounts ordered.
 776. (Sec. 6402.) Publication of notices approved.
 777. (Sec. 6408.) Notice of appeal from probate to common pleas court.
 778. (Sec. 6408.) Bond for appeal filed and approved.
 779. (Sec. 6410.) Judgment in common pleas on appeal.
 780. (Sec. 6413.) Order for investment of money pending suit, etc.

775. (Sec. 6402.) *Notice of filing accounts ordered.*

[*Title.*]

The following accounts having been filed in this court, it is ordered that notice thereof be published in the Cincinnati *Daily Gazette*, and that they will be for hearing on the — day of —, 18— [*not less than three weeks from day of publication*]. Which said accounts are as follows, to wit :

Account current of E. T., executor of C. D., deceased.

Final account of C. B., guardian of C. D., a minor.

etc.

etc.

776. (Sec. 6402.) *Publication of notice approved.*

[*Title.*]

This day proof of publication of notice of filing accounts and vouchers of administration [*or*, guardianship, trusteeship, *or*, of proceedings in assignment] was made, and the court hereby approve the same, and order the notice afore-said to be entered upon the journal of the court in full: said notice is as follows, viz.:

[*Copy notice in full.*]

Sec. 6408. Notice of appeal, from the probate court to the court or common pleas, may be given by adding to the entry appealed from, or making a separate entry, as follows :

777. (Sec. 6408.) *Notice of appeal from probate to common pleas court.*

Now comes the —, and gives notice of his intention to appeal this case to the court of common pleas.

And in proper cases add :]—

And the court fix the appeal bond at \$——.

778. (Sec. 6408.) *Bond, for appeal, filed and approved.*
[*Title.*]

Now comes the — herein, and gives his written undertaking, as provided by law, for the appeal of this case to the court of common pleas, in the sum of \$——, with W. P. and C. E. as sureties, which undertaking is hereby approved by the court.

Sec. 6410. For a general form to be used in entering judgments in the common pleas, on appeal from the probate court, the following may be used.

779. (Sec. 6410.) *Judgment in common pleas, on appeal from probate court.*
[*Title.*]

This cause came on this day to be heard, and was submitted to the court on the transcript from the probate court of this county, the original papers in the case, and the evidence; and, on consideration thereof, the court find [*make finding and judgment as if the case had begun in the common pleas, and conclude as follows :*]

It is further ordered that the clerk of this court make out and file in said probate court a transcript of the proceedings and judgment herein.

780. (Sec. 6413.) *Order for administrator to invest money pending suit, etc.*

[*Title.*]

It appearing to the court that T. H., the — of —, has in his hands the sum of \$——, to await the determination of

case No. —, Superior Court of Cincinnati, wherein W. H. is plaintiff and R. S. defendant, and the further order of this court, it is hereby ordered that said — invest said sum in [*name securities*], and hold them until further order of the court.

CHAPTER VIII.

APPROPRIATION OF PROPERTY.

- 781. (Sec. 6418.) Time for hearing fixed.
- 782. (Sec. 6419.) Order directing service by publication.
- 783. (Sec. 6420.) Preliminary questions determined, and jury ordered.
- 784. (Sec. 6428.) Writ issued for view of premises.
- 785. (Sec. 6432.) Entry of further hearing, and verdict.
- 786. (Sec. 6432.) Jury impaneled, and verdict rendered.
- 787. (Sec. 6432.) New trial granted.
- 788. (Sec. 6432.3.) Judgment on verdict.
- 789. (Sec. 6434.) Order that corporation make payment or deposit.
- 790. (Sec. 6434.) Judgment against corporation on its failure to make payment.
- 791. (Sec. 6438.) Judgment affirmed, on error, by the court of common pleas.
- 792. (Sec. 6438.) Judgment reversed, on error, and case retained for trial in common pleas.
- 793. (Sec. 6441.) Attorney appointed to attend proceedings for non-resident, etc.
- 794. (Sec. 6445.) Judgment by the court against former company's ownership of abandoned road-bed.
- 795. (Sec. 6446.) Judgment by the court in favor of defendant's ownership, etc., and jury ordered.
- 796. (Sec. 6446.) Judgment on verdict against former company's ownership, etc.
- 797. (Sec. 6446.) Judgment on verdict finding that defendant has interest, etc., and assessing damages.
- 798. (Sec. 6449.) Judgment on verdict against a corporation occupying land before appropriation.

781. (Sec. 6418.) *Time for hearing fixed.*

[*Title.*]

The court fix the — day of —, 18—, for the hearing of this cause.

782. (Sec. 6419.) *Order directing service by publication.*

[*Title.*]

It being made to appear to the satisfaction of the court, upon evidence, that the residence of the defendant, J. B., is beyond the State of Ohio [*or, is unknown*], it is now ordered that service by publication be made against the said J. B., in accordance with the provision of sec. 6419 of the Revised Statutes of Ohio.

783. (Sec. 6420.) *Preliminary questions determined, and jury ordered.*

[*Title.*]

This cause coming on for hearing, and being submitted to the court upon the evidence produced, the court find that the defendants have been duly served with process and are properly before the court; and further find that the plaintiff is a corporation, as averred in the petition herein, that it has the legal right to make the appropriation prayed for in the petition, and that the same is necessary, and that plaintiff is unable to agree with the defendants as to the compensation to be paid for the property sought to be appropriated herein [to all of which the defendant, J. H. B., excepts]. *

It is therefore ordered that to assess compensation for said property, herein sought to be appropriated, a jury be impaneled, according to law, and that said jury come on the — day of —, 18—, at 10 o'clock A. M., which time is hereby fixed for the impaneling of the same.

784. (Sec. 6428.) *Writ issued for view of premises.*

[*Title.*]

*As in No. 786 to *, and continue:—*

And on motion of — a writ was issued to the sheriff for a view by the jurors, in the presence of W. D. and C. L., of the premises sought to be appropriated, returnable, according to law, Thursday, September 15, 1882, at 10 o'clock A. M., to which time this cause is now adjourned.

785. (Sec. 6432.) *Entry of further hearing, and verdict.*

[*Title.*]

This day again came the parties hereto and their attorneys, and also the jury heretofore impaneled and sworn, and the hearing proceeded.

[*Conclude as from * in Entry No. 786*].

786. (Sec. 6432.) *Jury impaneled, and verdict rendered in appropriation.*

[*Title.*]

This cause came on this day to be heard, and the parties and their attorneys appeared, and also the following named jurors, heretofore summoned herein, viz., A. W. [*name*], and the panel not being complete, it was ordered that the sheriff fill the vacancies with talesmen;¹ and therefore S. W. and R. T. were called, and the panel was complete. And each juror being interrogated as to whether he was in any way interested, either as owner or agent, or otherwise, in the property sought to be condemned and appropriated,¹ and each answering in the negative, and neither party excepting thereto, the said jurors were duly sworn. *

And thereupon, after hearing the testimony of witnesses, argument of counsel, and charge of the court, the jury, after due deliberation, returned their verdict in writing to the court as follows, to wit :

"We, the jury, in this proceeding, assess the compensation to be paid by the plaintiff, the — Company, to the owner or owners of the lot of land described in the petition as lot "A," by reason of the appropriation of the same to the use of the said plaintiff, irrespective of any improvement proposed by said corporation, at — dollars.

A. G. M.

etc.

T. G. H.

etc.

A. C., Foreman."

787. (Sec. 6432.) *New trial granted.*

[*Title.*]

On motion of the —, and for good cause shown, a new trial is granted in this case.

¹ By sec. 6425.

788. (Secs. 6432,3.) *Judgment on verdict.*

[*Title.*]

The jury herein having assessed the amount of compensation in this case to be paid to the owner or owners of the premises described in the petition as lot "A," by reason of the appropriation of the same to the use of the plaintiff at — dollars, * it is now therefore adjudged that said verdict be confirmed, and that said plaintiff, upon payment of the amount of said verdict, and of all costs due from them,¹ shall be entitled to take possession of and hold the premises aforesaid, with all rights and interests thereto belonging and appertaining, for the uses and purposes for which the appropriation was made; and all necessary process to put said plaintiff in possession of the same is thereupon awarded.

789. (Sec. 6434.) *Order that corporation make payment or deposit.*

[*Title.*]

On motion of the defendant, E. F., and it appearing that the plaintiff herein has failed to make payment or deposit of the amount of the verdict rendered herein, it is now ordered that the said plaintiff pay or deposit such sum, together with costs, as required by law, within thirty days from this date, or then be held and considered to have abandoned the said property so appropriated, and all claims thereon, under this proceeding.

790. (Sec. 6434.) *Judgment against corporation on its failure to make payment.*

[*Title.*]

The plaintiff herein having failed to make payment of the amount of the verdict rendered in this case, in favor of the defendant, E. F., it is now ordered that said plaintiff be considered to have abandoned the property so appropriated, and all claims thereon, under this proceeding. And the court now on evidence offered find that the costs and ex-

¹ As to costs, see sec. 6451, and in case a deposit for the property has been made and not accepted, see sec. 6452.

penses incurred by the said E. F., including time spent and attorney fees, in this behalf, amount to — dollars.

It is therefore considered and adjudged that the said E. F. recover from the said plaintiff the said sum of \$—, and execution is awarded therefor.

791. (Sec. 6438.) *Judgment affirmed, on error, by the court of common pleas.*

[Title.]

Use form of Entry No. 821 or 822, page 402.

792. (Sec. 6438.) *Judgment reversed, on error, and case retained for trial in the court of common pleas.*

[Title.]

Use form of Entry No. 826, page 404.

Secs. 6438-40. On trial in the common pleas, the forms of entries will be substantially the same as in the probate court.

793. (Sec. 6441.) *Attorney appointed to attend proceedings for non-resident, etc.*

[Title.]

E. F., one of the parties in interest herein, not having appeared in these proceedings by agent or attorney [*or other cause may be stated*], the court hereby appoints H. A. attorney to attend upon these proceedings in behalf of the said E. F.

Sec. 6443. Order for investment may be similar to Entry No. 780.

Sec. 6445. The action here provided for may by sec. 6447, as amended 79 O. L. 65, be prosecuted in the probate court, court of common pleas or superior court. And by sec. 6446 the question of the former company's ownership of the abandoned road-bed, may be determined by the court on an issue of law, or by the jury on an issue of fact.

794. (Sec. 6446.) *Judgment by the court against former company's ownership of abandoned road-bed.*

[Title.]

*As in entry No. 783 to *, and continue:]—*

The court further find that the defendant, the — com-

pany, is not entitled to the ownership of, and has no interest in, the road-bed sought to be condemned in this case. It is therefore adjudged by the court that the claim of said company to said road-bed be forever quieted as against this plaintiff; and that they pay the costs of this proceeding.

[*Conclude, as to other defendants, as from * in Entry No. 783.*]

795. (Sec. 6446.) *Judgment by the court in favor of defendant's ownership of abandoned road-bed, and jury ordered.*

[*Title.*]

*Entry may be made as in No. 783 to *, and continue:*]—The court further find that the defendant, the W. W. V. R. R. Co., has an interest in the road-bed sought to be condemned in these proceedings. [*Conclude as from * in Entry No. 783.*]

For entry on return of verdict, modify Entry No. 786.

For judgment on the verdict, modify Entry No. 788.

Or, by sec. 6446, the question of the ownership of such road-bed, if a question of fact, may be determined by a jury. Make the preliminary finding as in Entry No. 783. For entry on verdict returned, modify No. 786. Judgment on the verdict may be as follows:

796. (Sec. 6446.) *Judgment on verdict against former company's ownership of abandoned road-bed.*

[*Title.*]

The jury herein having at a former day of this court found that the defendant, the — Company, has no interest in the road-bed sought to be condemned by the plaintiff.

It is therefore considered by the court that the claim of said defendant to said road-bed be forever quieted as against this plaintiff, and that said plaintiff recover from said defendants its costs herein expended.

But if the jury find that the company claiming the road-bed has an interest in it, and assess the compensation due them on account of its appropriation by the plaintiff, judgment on this verdict may be as follows:

797. (Sec. 6446.) *Judgment on verdict finding that defendant has interest in road-bed, etc., and assessing compensation.*

[*Title.*]

The jury herein having found that the company has an interest in the road-bed sought to be condemned in these proceedings, and having also assessed the amount of compensation to be paid to the said — Company at \$——, by reason of the appropriation of the same to the use of the plaintiff [*conclude as from * in No. 788*].

Sec. 6449. The entry of verdict may be in the same form as Entry No. 786. The judgment on the verdict as follows:

798. (Sec. 6449.) *Judgment on verdict against a corporation occupying land before appropriation.*

[*Title.*]

*As in Entry No. 788 to *, and continue:]—*

It is therefore considered by the court that the plaintiff herein recover from the said — Company the said sum of \$——, and his costs herein expended, and execution is awarded therefor.

Sec. 6450. The injunction proceedings and entries will be the same as in other cases.

MISCELLANEOUS.

ADOPTION OF INFANTS.

INSANE PERSON.

JUSTICES OF THE PEACE.

PARTNERSHIPS.

ADOPTION OF INFANTS.

800. Next friend appointed.

801. (Secs. 3137-9.) Order for adoption.

It is the custom with the Probate Court of Hamilton County to appoint a next friend for the infant, when it has no parent or guardian, who, on being satisfied that the proposed adoption will be for the benefit of the child, shall sign the consent thereto.

800. *Next friend appointed.*

[Title.]

It appearing to the court that the infant, L. F., whom D. W. and A. W. propose to adopt, has neither father, mother, nor guardian [*or*, has been abandoned by its father and mother], L. W. is hereby appointed next friend for said infant to act instead of a parent in the matter of said adoption.

801. (Secs. 3137-9.) *Order for adoption.*

[Title.]

It appearing to the court from the petition of D. W. and A. W., his wife, inhabitants of the State of Ohio, that they desire to adopt L. F., a minor child, not theirs by birth, and that the name of said child may be changed to L. W., said child being four years of age on the 31st of December, 1881; and said petitioners having produced the written consent of — to such adoption, and the court having examined the said A. W., wife of said D. W., separate and apart from her said husband, and being satisfied that she consents to such adop-

tion of her own free will and accord, and desires the same; and being satisfied that said petitioners are of sufficient ability to bring up and educate such child properly, and of the fitness and propriety of such adoption, it is hereby ordered and declared that from this date said child, to all legal intents and purposes, be the child of the petitioners, and that the name of such child be changed as above named.

INSANE PERSON.

802. (Secs. 704 and 740.) *Insanity found.*

[*Title.*]

This cause coming on this day to be heard upon the affidavit of M. S. and the testimony of witnesses, the court being fully advised in the premises, find the said S. C. to be insane, and order her committed to ——— asylum.

CHAPTER IX.

JUSTICES OF THE PEACE.

803. (Sec. 568.) Order increasing number, in township.

804. (Sec. 572.) Citation, and freeholders appointed in case of contest.

805. (Sec. 573.) Judgment on decision of freeholders.

803. (Sec. 568.) *Order increasing number of justices, in township.*

In re increasing number }
of justices in ——— }
township.

It appearing to the court, by the petition of M. B. L. and other residents of ——— township, in this county, that there is not a sufficient number of justices of the peace in said township, and that public notice has been given, according to law, of this application, the court now, upon full consideration of the matter, and it seeming just and proper, it is now ordered that there be one more justice of the peace added to said township.

A similar entry may be made for decreasing the number of justices.

804. (Sec. 572.) *Citation, and freeholders appointed, in case of contest.*

[*Title.*]

This day came E. D., a candidate at the last election for justice of the peace in — township, — county, Ohio, and gave notice, according to law, of his desire to contest the election of E. S., declared elected to said office. And thereupon a citation is issued for the said E. S. to appear on the — day of —, 18— [*not more than fifteen days from the day of election*], at the office of the probate judge in this county, for the hearing of the matter.

And the court appoint W. R. W., M. H., and L. E., three respectable freeholders of the county, not residents in the said — township, to try such contest, on the day above named; and summons is directed, returnable accordingly.

805. (Sec. 575.) *Judgment on decision of freeholders.*

[*Title.*]

This day this cause came on for hearing, and was fully heard on the testimony of witnesses, and was argued by counsel; and, after due consideration, the freeholders heretofore appointed by the court signed and sealed their decision in the matter, and the same was duly attested by the court; which decision is as follows, to wit [*copy decision*].

It is therefore adjudged by the court that — pay the costs of this proceeding [*and, in case the contestor is to pay costs, add*]: and execution is awarded.¹

PARTNERSHIPS.

DUTIES AND RIGHTS OF SURVIVING PARTNER—

806. (Sec. 3167.) Appraisers of assets appointed on application of surviving partner.

807. (Sec. 3168.) Same—on application of executor or administrator.

808. (Sec. 3167.) Inventory and appraisement returned and filed.

809. (Sec. 3169.) Assets of firm taken by surviving partner.

¹ By sec. 578.

DUTIES AND RIGHTS OF SURVIVING PARTNER—

806. (Sec. 3167.) *Appraisers of partnership assets appointed on application of surviving partner.*

[*Title.*]

On application of L. F., surviving partner of the firm of M. and F., of which firm L. F. was a member, the court appoint T. K., S. B., and M. D. as appraisers, to make, under oath, an inventory and appraisement of the assets and liabilities of the late partnership aforesaid, and return the same to this court.

807. (Sec. 3168.) *Same—on application of executor or administrator.*

[*Title.*]

L. F., the surviving partner of the decedent herein, having neglected [*or, refused*] to have an inventory and appraisement made of the partnership assets, the court now, on the application of E. T., the executor [*or, administrator*] of C. M., appoint T. K., S. B., and M. D. as appraisers, to make a complete inventory and appraisement of the assets and liabilities of the late firm of M. & F., and return the same to this court.

808. (Sec. 3167.) *Inventory and appraisement returned and filed.*

[*Title.*]

This day came L. F., the surviving partner of the firm of M. & F. [*or, E. T., the executor, or, administrator of C. M., deceased*], and returned his inventory and appraisement of the assets and liabilities of the late firm of M. & F., and the court, on consideration thereof, find the same in all respects correct and conformable to law, and hereby approve and confirm the same, and direct that it be filed.

809. (Sec. 3169.) *Assets of firm taken by surviving partner.*

[*Title.*]

The appraisers, heretofore appointed by the court, having returned their inventory and appraisement of the assets and liabilities of the late firm of M. & F., now comes the said L. F., the surviving partner, and elects to take the assets at

their appraised value, viz., — dollars, after first deducting the debts and liabilities, in the sum of \$—. And it appearing to the court that the executor [*or, administrator*] of the said C. M., deceased, consents thereto, and that said L. F. tenders his promissory note therefor, according to the statute, with J. R. and L. E. as sureties [*or name any other security*], and also tenders his bond for the payment of the debts and liabilities of said firm, with R. D. and R. C. as sureties, both of which securities are approved by the court, the court hereby approve of the taking of said assets, and authorize the immediate transfer of the personal property to the said L. F., and order that upon said notes and liabilities being paid in full the executor [*or, administrator*] of the said C. M. execute and deliver to him a deed of the interest of the said C. M. in the real estate belonging to said firm.

TITLE IV.

ERROR, MANDAMUS, AND QUO WARRANTO.

CHAP. I. JURISDICTION AND PROCEDURE IN ERROR.

II. MANDAMUS.

III. QUO WARRANTO.

CHAPTER I.

JURISDICTION AND PROCEDURE IN ERROR.

810. (Sec. 6716.) Order for substitution of copies, etc.
811. (Sec. 6718, etc.) Order fixing amount of bond
812. (Sec. 6719.) Order approving bond—when done by court.
813. (Sec. 6722.) Leave to proceed in execution, notwithstanding bond.
814. (Sec. 6725.) Order staying execution of judgment below, in certain cases.
815. (Sec. 6726.) Reversal, and judgment in reviewing court.
816. (Sec. 6726.) Reversal for error of court below in refusing a new trial.
817. Reversal and decree for sale.
818. (Sec. 6726.) Reversal, and cause remanded for judgment.
819. (Sec. 6726.) Reversal, and cause remanded for further proceedings.
820. (Sec. 6727.) Reversal in part, and affirmance in part.
821. (Sec. 6730.) Affirmance, with penalty.
822. (Sec. 6730.) Affirmance, without penalty.

DIMINUTION OF RECORD—

823. (Sec. 6731.) Order for complete transcript.

ERROR IN JUDGMENT OF A JUSTICE—

824. (Sec. 6732.) Judgment affirmed, and certified back.
825. (Sec. 6732.) Judgment affirmed, and execution in common pleas awarded.
826. (Sec. 6733.) Judgment reversed, and case retained.
827. (Sec. 6733.) Judgment reversed for want of jurisdiction of justice.

OLD CHANCERY CASES—

828. (Sec. 6738,9.) Order, in vacation, for stay of proceedings, etc.

MANDATES, AND THE ENTERING THEREOF IN THE COURT BELOW—

829. Judgment in obedience to a mandate, etc.

810. (Sec. 6716.) *Order for substitution of copies, etc.*

[*Title.*]

It appearing that the original papers and pleadings in this case, filed in this court, are needed in the court below, for purpose of record, it is ordered that copies thereof be made by the clerk, and filed in place of said originals, and that the originals be returned to the court below.

811. (Secs. 6718: 2, 3, 4, and sec. 6724.) *Order fixing amount of bond.*

[*Title.*]

It is ordered that the undertaking for the stay of execution in this case be given, according to law, in the sum of — dollars.

812. (Sec. 6719.) *Order approving bond—when done by the court.*

[*Title.*]

Now comes the —, and presents his undertaking for stay of execution in this case, with F. G. and H. I. as sureties; which said undertaking and sureties are hereby approved by the court.

813. (Sec. 6722.) *Leave to proceed in execution, notwithstanding bond.*

[*Title.*]

Now comes the said A. B., and makes application to the court for leave to enforce his judgment heretofore obtained herein, notwithstanding the undertaking of the said defendant, and presents his bond therefor, conditioned according to law, in the sum of \$——, with E. F. and J. D. as sureties, to the approval of the court; and thereupon the said A. B. is allowed to enforce his said judgment.

814. (Sec. 6725.) *Order staying execution of judgment below, in certain cases.*

[*Title.*]

On application of the plaintiff in error herein, it is hereby ordered that execution of the judgment [*or, final order*] of the [*name court below*], for the reversal of which the petition in this case was filed, be stayed until the final hearing of the cause in this court [*or less time*], upon plaintiff giving bond to —¹ in the sum of — dollars, to the effect that [*name conditions*], with sureties to the approval of this court.

[*Add any other conditions imposed by the court.*]

815. (Sec. 6726.) *Reversal, and judgment in reviewing court.*

[*Title.*]

This cause came on for hearing upon the petition in error, the transcript, and the original papers and pleadings from the [*name court*], and was argued by counsel; and, on consideration thereof, the court find that there is error apparent upon the record in the proceedings of said court, to the prejudice of the plaintiff in error.² ❖

It is therefore considered by this court that the judgment rendered by said court below be reversed and held for naught.

And the court further proceeding to render such judgment as the said — court ought to have rendered, find,³ etc.

It is therefore considered,³ etc.

It is further ordered that a special mandate be sent to the [*name court below*] for the execution of this judgment.

¹ Name the adverse party.

² To justify the reversal, the record must not only show error, but that it was to the prejudice of the party seeking to take advantage of it. *Ohio Life Ins. and Trust Co.*, 10 Ohio St. 557; *Banning v. Banning*, 12 Ohio St. 437; *Bear v. Knowles*, 36 Ohio St. 43.

³ The finding and judgment in the reviewing court will be in the same forms as an original finding in the common pleas, including costs, by sec. 6727.

As to rendering the judgment which the court below ought to have rendered, see *Columbus, etc., R. Co. v. Simpson*, 5 Ohio St. 251; *Etna Ins. Co. v. Church*, 21 Ohio St. 492; *Emery's Sons v. Bank*, 25 Ohio St. 360; *Stivers v. Borden*, 20 Ohio St. 232.

816. (Sec. 6726, 82 O. L. 38.) *Reversal for error of court below in refusing a new trial.*¹

[*Title.*]

*As in last to *, and continue:*—in this, to wit, that the said [*name court*] refused to the plaintiff here a new trial on his motion therefor.

It is therefore considered by this court that the judgment rendered by said court below be reversed and held for naught, and that [the verdict rendered by the court below be set aside, and that] a new trial be granted to the — in said court; and that the plaintiff in error recover his costs herein expended from the defendant in error; and that a special mandate be sent to the — court for the execution of this judgment.

817. (Sec. 6726, 82 O. L. 38.) *Reversal, and decree for sale.*

[*Title.*]

*As in decree No. 815 to *, and continue:*—

It is therefore considered by this court that the judgment rendered by said court below be reversed and held for naught.

And the court further proceeding to render such judgment as the said — court ought to have rendered, find, etc.

[*Let the decree for sale be in the usual form, except that instead of the order for the sheriff to report his proceedings to this court, order:—that he report his proceedings to the Court of Common Pleas of — County for further order.*]²

It is further ordered that a special mandate be sent to said common pleas court for the execution of this judgment and decree.²

¹ Where the only question before the court of error is as to the error of the court below in overruling a motion for a new trial, and when the party was not entitled to judgment on the pleadings, and there was no agreed statement of facts, or special finding of facts by the court below, the only judgment to be rendered after reversal is to grant a new trial, as moved for in the court below. See *Emery's Sons v. Irving National Bank*, 25 Ohio St. 360; *Stivers v. Borden*, 20 Ohio St. 232.

² It was held, under the former practice, in the case of *Craig v. Fox*, 16 Ohio,

818. (Sec. 6726, 82 O. L. 38.) *Reversal, and cause remanded for judgment.*

[*Title.*]

As in No. 815 to ❖, and continue:]—

It is therefore considered by this court that the judgment rendered by said court below be reversed and held for naught. And that the plaintiff in error recover from the defendant in error his costs herein expended, taxed at \$——.

And the court further proceeding to consider the premises, find,¹ etc.; and order that the cause be remanded to the [*name court*] for judgment in accordance with the above finding,² and that a special mandate therefor be sent to said court.

819. (Sec. 6726, 82 O. L. 38.) *Reversal, and cause remanded for further proceedings and judgment.*

[*Title.*]

As in No. 815 to ❖, and continue:]—

It is therefore considered by this court that the judgment rendered by said court below be reversed and held for naught, and that the plaintiff in error recover from the defendant in error his costs herein expended, taxed at \$——.

It is further ordered that this cause be remanded to the [*name court*] for further proceedings [*or, a new trial*], and for judgment;³ and that a special mandate therefor be sent to said court.

820. (Sec. 6727.) *Reversal in part, and affirmance in part.*

[*Title.*]

As in entry No. 815 to ❖, and continue:]—in so much of the said judgment as [*here state the part to be reversed*], and as to the same the said judgment is hereby reversed. And

563, that it was proper for the order of sale to issue out of the common pleas court. By sec. 5373 an order of sale is an execution and it would seem that the court of error must remand the case, for the order of sale.

¹As to when the reviewing court can find for either party, instead of sending the case back to the court below for a new trial, see the cases under note 3, p. 399.

²For judgment in the court below, in accordance with this order, see entry No. 829, page 405.

³See note 1, to previous entry.

the court finding no error in the residue of said proceedings and judgment, do therefore affirm the same. [*Conclude as in one of the above entries, either to enter final judgment, or remand for further proceedings. Costs must be equally divided between the parties.*]

821. (Sec. 6730, 82 O. L. 38.) *Affirmance, with penalty.*

[*Title.*]

This cause came on for hearing upon the petition in error, the transcript, and the original papers and pleadings from the Court of Common Pleas of — County, and was argued by counsel; on consideration whereof, the court find there is no error apparent on the record in said proceedings and judgment.

It is therefore considered by the court that the judgment aforesaid be, and the same hereby is, affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended, including a counsel fee to the defendant of \$—,¹ taxed at \$—, * and also the sum of — dollars, being five per cent penalty on the amount due to him on the judgment aforesaid.

It is further ordered that a special mandate be sent to the Common Pleas Court of — County, for execution upon this judgment.

822. (Sec. 6730, 82 O. L. 38.) *Affirmance, without penalty.*

[*Title.*]

*As in last to *, and continue :—*

And the court being of opinion that there was reasonable ground for proceedings in error, allow no penalty.

It is further ordered that a special mandate be sent to the Common Pleas Court of — County, for execution upon this judgment.

DIMINUTION OF RECORD—

Upon petition in error the court may order the court of common pleas to send up a perfect transcript of its record; but it has no power, in such a case, to order an amendment of the record itself.²

¹By sec. 6712, as amended 82 O. L. 37

²Wood v. Newkirk, 15 Ohio St. 295. See also, Tanner v. Brown, 2 A. L. 617.

The way to obviate an objection that the "record of the justice" sent up on appeal is "defective in substance and form," is by suggesting a diminution of the record, and getting an order requiring the magistrate to send up a perfect record of his proceedings.¹

823. (Sec. 6731.) *Order for complete transcript.*

[*Title.*]

On suggestion of the — herein that the transcript of the record of the — court of — [*or*, of the proceedings of the justice], sent up to this court in this case, is imperfect and defective, it is, on motion of the said —, ordered that the clerk of the said — court of — [*or*, the said H. M., justice of the peace], do forthwith, upon the service of this order, certify up to this court a complete and perfect transcript of the record and proceedings aforesaid.

ERROR IN JUDGMENT OF A JUSTICE—

824. (Sec. 6732.) *Judgment affirmed, and certified back.*

[*Title.*]

This cause came on for hearing upon the petition in error and the transcript of the proceedings and judgment of E. P., a justice of the peace for this said county: on consideration whereof, the court find * there is no error in said proceedings and judgment, and the said judgment is therefore affirmed at the cost of the plaintiff in error, taxed at \$—. And execution is awarded therefor.

It is further ordered that the clerk of this court certify this decision in the premises to the said justice, that the judgment affirmed may be enforced, as if these proceedings in error had not been taken.

825. (Sec. 6732.) *Judgment of justice affirmed, and execution in common pleas awarded.*

[*Title.*]

As in last to *, and continue:]—there is no error in said proceeding and judgment, and the said judgment is there-

¹ Reedy v. Gift, 2 Kan. 392.

fore affirmed at the cost of the plaintiff in error, taxed at \$——.

It is further ordered that the said judgment be carried into effect in the same manner as if rendered in this court, and execution is awarded therefor, as well as for costs herein.

826. (Sec. 6733.) *Judgment of justice reversed, and case retained.*

[Title.]

*As in Entry No. 824 to *, and continue:*—that there is error in said proceedings and judgment, and the said judgment is therefore reversed at the cost up to the present time¹ of the defendant in error; and execution is awarded therefor.

It is further ordered that this cause be retained for trial and judgment, as in case of appeal.²

827. (Sec. 6733.) *Judgment reversed for want of jurisdiction of justice.*

[Title.]

*As in Entry No. 824 to *, and conclude:*—that there is error in said proceedings and judgment, in that said justice had no jurisdiction of the plaintiff in error [*or*, of the subject-matter of this action]; and the said judgment is therefore reversed at the cost up to the present time of the defendant in error; and execution is awarded therefor.

OLD CHANCERY CASES—

828. (Secs. 6738 and 6739.) *Order, in vacation, for stay of proceedings in chancery proceeding pending July 1, 1853.*

[Title.]

IN CHAMBERS, ——. —, 18—.

On application of the complainant herein, it is ordered that all further proceedings upon the decree rendered in this case by the court below until the next term of this court, upon said complainant giving bond to —, in the sum of —

¹ Including costs in the justice's court. *Belford v. Parrish*, 22 Ohio St. 371.

² The time for filing pleadings in the common pleas will be as provided in Rule XIX. of the supreme court, *post*, dating from the entry of reversal.

dollars, to the effect that [*name condition*], with security to my approval.

(Signed)

A. B.,

Judge of the — Court of —.

MANDATES, AND THE ENTERING THEREOF IN THE COURT BELOW—

When a mandate is received from the district or supreme court, it should be entered on the journal, and an order for execution made on the same.¹

The order for execution may be by a general and standing order of the court that execution issue on all mandates received, but it is better practice to order execution in each case,² as follows:

Order preceding mandate.

A certain mandate having been received from the — Court of —, it is hereby ordered that due execution thereof be had; which said mandate is in the words and figures following, to wit [*copy mandate*].

829. *Judgment in obedience to a mandate of a superior court.*²
[*Title.*]

And now this cause coming on for further consideration, upon the mandate of the circuit court, and the instructions therein to this court, it is thereupon considered that the said — recover from the said — the said sum of — dollars, so found due by the district court, together with his costs herein expended.

¹ Earl's Lessee v. Shoulder, 6 Ohio, 409.

² See order for this judgment in the district court. Entry No. 818, and note.

CHAPTER II.

MANDAMUS.

830. (Sec. 6743.) Order to show cause why writ should not be allowed.
831. (Sec. 6743 and 6745.) Order allowing alternative writ without notice.
832. (Sec. 6743 and 6745.) Order allowing peremptory writ without notice.
833. Order allowing writ after notice, etc.
834. Order refusing writ.
835. (Sec. 6750.) Judgment allowing peremptory writ, when no answer is made to alternative.
836. (Sec. 6752.) Judgment, on trial, allowing peremptory writ.
837. (Sec. 6753.) Judgment allowing peremptory writ, and awarding damages.
- 837a. (Sec. 6753.) Judgment allowing peremptory writ, and sending case to jury for assessment of damages.
838. Judgment for costs, alternative writ obeyed.
839. (Sec. 6755.) Judgment for defendant.
840. (Sec. 6756.) Judgment for plaintiff, and fine imposed.
841. (Sec. 6757.) Special order to auditor to levy tax, etc.

This writ may be issued by the supreme, circuit, or common pleas courts. The notice of the application, which by sec. 6743 the court may require, does not need a journal entry; the court simply requiring, in their discretion, all parties to have notice before they make any order.

830. (Sec. 6743.) *Order to show cause why writ should not be allowed.*

[*Title.*]

The relator now making application for the allowance of a writ of mandamus herein, the court order that said application be set down for hearing on the — inst., at — o'clock — m., and that due notice of said time and place be given to the said C. D., who then and there may show cause why said writ should not be allowed.

831. (Sec. 6743 and 6745.) *Order allowing alternative writ without notice.*

[*Title.*]

Now came the relator, and made application for the allowance of a writ of mandamus herein; and, on consideration

thereof, the court * allow an alternative writ to issue against the said C. D., returnable to this court on the — day of —, 18—.

And it is ordered that the said C. D. do, immediately upon the service of this writ [*set out duty to be performed*]; or that at the time and place of the return of this writ he show cause why he has not done so.¹

832. (Secs. 6743 and 6745.) *Order allowing peremptory writ without notice.*

[*Title.*]

Now came the relator, and moved the court for the allowance of a writ of mandamus herein; and, on consideration, the court * find the relator's right to require the performance of the act hereinafter commanded to be clear, and that no valid excuse can be given for not performing it; and therefore allow a peremptory writ to issue as prayed for. And it is ordered that the said C. D. do, immediately upon the service of this writ [*set out the duty to be performed*].² [†]

And it is further ordered that the said relator recover from the defendant his costs expended.

833. *Order allowing writ after notice, or after order to show cause against.*

[*Title.*]

And now this cause coming on for hearing upon the application for the allowance of a writ of mandamus, on consideration thereof, the court finding that no [*or, no sufficient*] cause has been shown against the same [*conclude as from * in Entry No. 831, if an alternative writ is allowed, or as from * in Entry No. 832, if a peremptory writ is allowed*].

834. *Order refusing writ*

[*Title.*]

As in No. 831 to *, and continue:]—find that the plaintiff is not entitled to the relief prayed for, or to maintain his proceedings in mandamus against this respondent. It is therefore adjudged that this application be dismissed at the cost of the relator.

¹ Sec. 6766.

835. (Sec. 6750.) *Judgment allowing peremptory writ, when no answer is made to alternative.*

[*Title.*]

This cause coming on to be heard on the return of the alternative writ of mandamus heretofore issued herein, and no answer having been made by said defendant, the court find the facts to be as set forth in the petition, and that the relator is entitled to have said writ made peremptory.

It is therefore ordered that a peremptory writ of mandamus issue against the said C. D. for the performance of the act heretofore alternatively ordered, and that immediately upon the service of this writ he act accordingly [*or the duty enjoined may again be set out*]. *

[*Add any order as to costs. If damages are given, see Entry No. 837. If fine is imposed, see Entry No. 840.*]

836. (Sec. 6752.) *Judgment for plaintiff, on trial, allowing peremptory writ.*

[*Title.*]

This cause coming on to be heard on the petition herein, the answer thereto, and the evidence, the court find, upon the issue joined, for the relators, and that they are entitled to a peremptory mandamus herein.

It is therefore ordered that a peremptory writ of mandamus issue against the said C. D. for the performance of the act heretofore alternatively ordered; and that immediately upon the service of this writ he do the act alternatively ordered [*or the act may be again set out*]. *

[*Add any order as to costs. If damages are given, see Entry No. 838. If fine is imposed, see Entry No. 840.*]

837. (Sec. 6753.) *Judgment allowing peremptory writ, and awarding damages.*

[*Title.*]

*As in one of the last two entries to *, and continue as follows:—*

And the court further find that by reason of the facts set up in the petition, the relator has been damaged by the said defendant in the sum of \$——.

It is therefore considered by the court that the said relator, A. B., recover from the defendant, C. D., the said sum of —— dollars, and his costs herein expended.

837a. (Sec. 6753.) *Judgment allowing peremptory writ, and sending case to jury for assessment of damages.*

[*Title.*]

*As in Entry No. 835 or 836 to *, and continue:]—*

And for the assessment of damages to which the relator is entitled, by reason of the facts set up in the petition, the case is sent to a jury.

For entry on return of verdict and of judgment, follow the forms of Entries Nos. 242 and 243.

838. *Judgment for costs—alternative writ obeyed.*

[*Title.*]

This cause coming on to be heard upon the return of the alternative writ of mandamus heretofore issued in this case, and it appearing to the court that the respondent herein has complied with the order contained in said writ:

It is therefore considered that no further proceedings be had herein, and that the case be discontinued: and that the said defendant pay the costs herein, taxed at \$——.

839. (Sec. 6755.) *Judgment for defendant.*

[*Title.*]

This cause coming on to be heard upon the petition herein, the answer thereto, and the evidence, the court find, upon the issue, for the defendant, and find that the relator is not entitled to a writ of mandamus against him.

It is therefore considered that the defendant go hence without day, and that he recover from the relator his costs herein expended.

840. (Sec. 6756.) *Judgment for plaintiff, and fine imposed.*

[*Title.*]

*As in No. 835 or 836 to *, and continue as follows:]—*

And it appearing to the court that the performance of the duty here commanded was specially enjoined by law upon the said defendant, and that said defendant, without just excuse, refused [*or, neglected*] to perform said duty, it is ordered and adjudged by the court that a fine of —— dollars be, and hereby is, imposed upon the said defendant for this his said

refusal and neglect, and that he pay the costs of this proceeding, taxed at \$——: for all of which execution is awarded.

841. (Sec. 6757.) *Special order to auditor to levy tax, etc.*

[*Title.*]

It being shown to the court that the defendants herein have resigned [*or otherwise as stated in this section*], it is now, on motion of ——, ordered that the auditor of this county levy and assess upon the taxable property of the county [*or otherwise*] the taxes required by the former judgment of this court in this case, for the purposes therein named, and that he place the same upon the duplicate for collection in due course of law; and that a special order for this purpose be issued by the clerk of this court to R. M., auditor, as aforesaid.

CHAPTER III.

QUO WARRANTO.

842. (Sec. 6763.) Officer allowed to bring action on relation of other person.

843. (Sec. 6765.) Member of bar substituted for prosecutor.

844. (Sec. 6769.) Order that notice be given.

845. (Sec. 6774.) Decree of ouster from office.

846. (Sec. 6775.) Decree of ouster against directors of corporation, and order of induction.

847. (Sec. 6776.) Same, and order for new election.

848. (Sec. 6780-1.) Decree dissolving corporation for non-user.

849. Report of trustee approved, etc.

850. (Sec. 6780-1.) Decree of ouster against a corporation, from exercise of illegal power.

851. (Sec. 6787.) Order that directors of bank give security, etc.

852. (Sec. 6787.) Bond approved

853. Judgment for defendants.

842. (Sec. 6763.) *Officer allowed to bring action on relation of other person.*¹

[*Title.*]

On motion, the prosecuting attorney is granted leave to

¹ This allowance is often made by the judge indorsing on the back of the petition permission to file the same; but an entry should also be made on the journal. See sec. 6769.

bring an action of quo warranto, on the relation of A. B., against C. D.

If under Sub. 1 of sec. 6760, court may add :]—upon security for costs being given by the said A. B.

843. (Sec. 6765.) *Member of bar substituted for prosecutor.*

[*Title.*]

On motion of —, and the court finding [*give cause*], it is hereby ordered that L. M., a disinterested member of the bar, be, and he is hereby, appointed to act in the place of the prosecuting attorney in bringing and prosecuting an action of quo warranto [on the relation of A. B.] against C. D.

844. (Sec. 6769.) *Order that notice be given, etc.*

[*Title.*]

Application having been made herein for leave to file a petition in quo warranto, it is ordered by the court that the hearing of said application be set down for Tuesday, the — inst., at — o'clock A. M., and that notice thereof be given to said defendants by the prosecuting attorney.

If, upon hearing, leave be granted, make Entry No. 842. above.

845. (Sec. 6774.) *Decree of ouster from office.*

[*Title.*]

This cause being heard on the petition, the answer of —, the testimony, and argument of counsel, the court, on consideration, find [*state facts*]; and that by reason thereof the said election was void and of no effect, and that the said defendant is guilty of intruding into the office of mayor of said village of —, and of unlawfully holding and exercising the same.

It is therefore ordered and adjudged that the said C. D. be, and he hereby is, ousted and altogether excluded from said office, and from all the franchises, privileges, and emoluments thereof, and that the said relator recover from the said defendant his costs therein expended, taxed at \$—.

If necessary, add as follows, by sec. 6785:—

It is further ordered by the court that said defendants forthwith deliver over all the books, papers, property, money, deeds, notes, bills, and obligations to the relators herein.

Ordered, that a transcript of these proceedings, including a copy of this order, be sent to the Court of Common Pleas of — County, with a special mandate directing said court to carry the above order into effect.

For proceedings in attachment, under sec. 6785, when order is disobeyed, see CONTEMPTS OF COURT, page. 206.

846. (Sec. 6775.) *Decree of ouster against directors of corporation, and order for induction.*

[Title.]

This cause came on to be heard upon the petition, answer, and reply, and upon the proofs and the arguments of counsel: on consideration whereof, the court are of opinion, and do find, that at the annual election for directors of the — Turnpike Company, held on the — day of —, 18—, each of the relators herein was the lawful owner of certain shares of the capital stock of said company, and entitled to cast one vote for each of said shares for directors aforesaid, and that at said election each of said relators offered to vote upon said shares by ballot, and tendered his ballot accordingly for the relators for directors of said company to serve for one year from March 1, 1872, but that said ballots were rejected, and the defendants were declared elected, and are now acting as such directors, whereas, if said ballots had been received, as of right they should have been, the relators would have received a majority of all of the votes cast at said election, and have been duly elected and entitled to qualify and act as such directors for one year from said March 1, 1872.

Wherefore it is ordered by the court that the defendants be, and they are hereby, ousted and altogether excluded from all and singular their title and right, franchise and privilege, to act as directors of said company by virtue of said election. * And that the relators herein be inducted thereinto; and,

further, that they recover from the defendants their costs herein expended.¹

847. (Sec. 6776.) *Same as last, and order for new election.*

[*Title.*]

*As in last to *, and continue:]*—And it is further ordered by the court that a new election for directors of said corporation be held on the — of day —, 18—, and that R. N. and L. S. act as the judges of said election, and give previous notice of the same, and perform all their other duties according to law.

It is further adjudged that the relators recover from the defendants their costs herein expended.

[*Add, if necessary, the orders following Entry No. 845.*]

For entries under sec. 6779, see entries under CONTEMPTS OF COURT, page 206.

848. (Sec. 6780-1.) *Decree dissolving corporation for non-user, etc.*

[*Title.*]

This cause coming on to be heard upon the petition and answer, testimony, and argument of counsel, upon consideration thereof, the court find that the defendant, the said — company, has [*state facts*], whereby it has surrendered [*or*, forfeited] its corporate rights, privileges, and franchises.

It is therefore considered and adjudged that said corporation be ousted and altogether excluded from such corporate rights, privileges, and franchises, and that said corporation be dissolved.

It is further ordered that L. M. and R. S. be, and they hereby are, appointed trustees of the creditors and stockholders of the said corporation, with full power to settle the affairs of the corporation, to collect and pay debts, and to divide among the stockholders of said corporation the moneys

¹ The order for turning over books, moneys, etc., and for transcript, as in last decree, may be made, if necessary.

and property remaining, and that they report their proceedings to this court for confirmation.

And it is ordered that said trustees, before entering upon the duties of their office, give bond in the sum of — dollars, conditioned according to law, with sureties to the approval of this court.

And now thereupon came the said L. M. and R. S., and presented their bond as aforesaid, with T. M. and R. M. as sureties to the approval of the court.

849 *Report of trustee approved, etc.*

[*Title.*]

This cause came on for hearing on the motion to confirm the report of L. M., the trustee heretofore appointed herein, and the court finding that he has in all things obeyed the order of this court, and paid over all the moneys coming into his hands as such trustee, except the sum of \$——, which the court allow him as his reasonable fee in this case, and has paid the costs of this proceeding, it is hereby ordered that the proceedings and report of the said trustee be, and they hereby are, confirmed and approved. And he is hereby discharged from the duties and responsibilities of said office.

850. (Secs. 6780-1.) *Decree of ouster, against a corporation, from exercising illegal power.*

[*Title.*]

This cause coming on to be heard upon the petition and answer, testimony, and argument of counsel, upon consideration thereof, the court find that the defendant, the said — Company, has, as alleged, exercised the franchise and privilege of carrying on the business of manufacturing paper outside of the State of Ohio, to wit, at —, in the State of Indiana, contrary to, and without the authority of, the laws of the State of Ohio, and in violation of the law of its incorporation.

Wherefore, it is ordered and decreed that said company be, and it is hereby, ousted of said franchise and privilege of carrying on said business outside of the State of Ohio as aforesaid; and that the plaintiff recover from said defendant his costs herein expended.

For proceedings under sec. 6783, see CONTEMPTS OF COURT, page 206.

For order of delivery of books, etc., under sec. 6785, see after No. 845.

For proceedings in attachment when order is not obeyed, see CONTEMPTS OF COURT, page 206.

For proceedings and entries granting injunction, under secs. 6786, 7, and 8, see INJUNCTION, page 188.

851. (Sec. 6787.) *Order that directors of bank give security, etc.*

[*Title.*]

This cause being heard on motion of the relators, to require the defendants to give security, etc., and the court finding upon the proofs offered that said defendants have violated [*or, are about to violate*] the franchises of thier corporation, in this, to wit [*specify*], it is ordered that the said C. D., E. F., etc. [*name all*], directors of the [*name corporation*], give security to the stockholders thereof, by bond in the sum of \$——, with sureties to the satisfaction of the court, for the proper discharge of their duties, and for the proper management and security of the assets of said company.

852. (Sec. 6787.) *Bond approved*

[*Title.*]

And now come C. D., E. F., etc. [*naming all*], directors of [*name corporation*], and enter into an undertaking, as heretofore ordered by the court in the sum of \$——, with R. S. and J. D. as sureties to the approval of the court.

853. *Judgment for defendants.*

[*Title.*]

This cause came on to be heard on the petition and reply, and on the proof and arguments: upon consideration whereof, the court are of opinion and find that the said relators are not entitled to the relief sought. And that the defendants were, on the —— day of ——, 18—, duly elected directors of the —— Company for the term of three years from said day, and are entitled to all the privileges and franchises thereof.

Wherefore, it is ordered and adjudged that said petition be dismissed at the cost of the relators, taxed at \$—— [*or*, that said defendant go hence without day and recover from the said relators their costs herein expended].

To all of which said relators and said prosecuting attorney except.

MISCELLANEOUS PROCEEDINGS.

- I. ACTIONS, PENDING PROCEEDINGS IN BANKRUPTCY.
- II. ASSESSMENT FOR STREET IMPROVEMENT.
- III. CHATTEL MORTGAGE.
- IV. CONVEYANCE OF REAL ESTATE.
- V. FOREIGN JUDGMENT.
- VI. LEASEHOLD ESTATE.
- VII. MECHANIC'S LIEN.
- VIII. NATURALIZATION.
- IX. REMOVAL AND RESERVATION OF CASES.
- X. SPECIFIC PERFORMANCE.
- XI. STOCKHOLDER'S LIABILITY.
- XII. VENDOR'S LIEN.
- XIII. VESTING PROPERTY IN TRUSTEES.
- XIV. WILLS.

 I. ACTIONS, PENDING PROCEEDINGS IN BANKRUPTCY.¹

[Revised Statutes of the United States.]

854. (Sec. 5106.) Order staying, pending proceedings, etc.

855. (Sec. 5106.) Order that case proceed to judgment.

856. Order staying, after discharge, etc.

857. Case dismissed, when instituted after, etc.

The provisions of sections 5105 and 5106 of the Revised Statutes of the United States, concerning a stay of proceedings, are addressed quite as much to the state courts as to the bankruptcy tribunals, and are to be applied and enforced by the former quite as much as by the latter.²

¹These entries are retained for the reason that there are many unfinished cases in the bankrupt courts.

²In re Rosenberg, 2 B. R. 236; s. c., 3 Ben. 14; in re Metcalf et al., 1 B. R. 201.

In cases of voluntary bankruptcy, an application for a stay may be made as soon as the petition is filed, but no application can be made in cases of involuntary bankruptcy, until the order of adjudication is passed.¹

The stay in the state courts is obtained upon motion supported by the production of a copy of the order of adjudication. It will not be made by the court of its own motion, or on the plaintiff's suggestion. A valid judgment can be rendered against a bankrupt, unless he avails himself of the proceedings in bankruptcy.² The stay is temporary, as expressed in the order. It ceases as soon as the question of the bankrupt's discharge is decided. No order to show its termination is necessary.³ If the bankrupt be discharged, he must plead his discharge in the suit as his protection against its further prosecution.³ If there is unreasonable delay in procuring a discharge, the order staying proceedings will be vacated.⁴

Where one partner is bankrupt, the proceedings may be stayed as to him, and a judgment may be entered against the other partner.⁵

An action pending in the court of appeals of the state to which an appeal was taken by the bankrupt, prior to the commencement of proceedings in bankruptcy, may be stayed.⁶

The state courts may also by injunction protect the bankrupt in the enjoyment of property acquired after the commencement of proceedings in bankruptcy pending the question of discharge, as against an execution levied on it in satisfaction of a judgment obtained before the declaration of bankruptcy.⁷

By the discharge in bankruptcy an action is barred if the debt is provable, although it is not actually proved.⁸ And when the discharge is pleaded by the bankrupt, the action will be finally stayed. The discharge can not be taken advantage of by motion.⁹

¹ Maxwell et al. v. Faxton et al., 4 B. R. 210; s. c., 18 Pitts. L. J. 107; *contra*, in re Bromley & Co., 3 B. R. 686.

² Palmer v. Merrill, 57 Me. 26; in re Leibenstein et al., 4 C. L. N. 309; Stone v. National Bank, 39 Ind. 284.

³ In re Thomas, 3 B. R. 38; in re Rosenberg, 2 B. R. 236.

⁴ In re Belden, 6 B. R. 443; s. c., 5 Ben. 476.

⁵ Lomme v. Kintzing, 1 Montana, 290.

⁶ In re Metcalf et al., 1 B. R. 201. But see *contra*, Merritt v. Glidden, 39 Cal. 559.

⁷ Mosby v. Steele, 7 Ala. 299; Turner v. Gatewood, 8 B. Mon. 613.

⁸ Hardy v. Carter, 8 Humph. 153; Rogers v. Western Ins. Co., 1 La. An. 161.

⁹ Fellows v. Hall, 3 McLean, 281.

By section 5047, Revised Statutes of the United States, the assignee in bankruptcy may, in certain cases, be substituted for the bankrupt as a party to a pending suit. Use the usual forms as given in Chapter III., PARTIES TO ACTION, page 14.

854. (Sec. 5106.) *Order staying, pending proceedings in bankruptcy.*

[*Title.*]

This cause coming on to be heard on the motion of the defendant for a stay of proceedings, and it appearing to the court that the said defendant has been adjudicated a bankrupt [*or, has filed his petition in bankruptcy*]¹ in the District Court of the United States for the Southern District of Ohio, all further proceedings in this action are hereby stayed until the determination of the court in bankruptcy on the question of the said defendant's discharge.

855. (Sec. 5106.) *Order that case proceed to judgment.*

[*Title.*]

This cause coming on for hearing on the motion of the defendant to stay proceedings herein, and it appearing to the court that the amount due this plaintiff is in dispute, and leave having been obtained from the court in bankruptcy, it is ordered that this case proceed to judgment for the purpose of ascertaining the amount due. But execution on such judgment shall be stayed.

856. *Order staying, after discharge in bankruptcy.*

[*Title.*]

And now this cause coming on to be heard, and it appearing upon the plea of the defendant that since the commencement of this action the said defendant has obtained a discharge in bankruptcy in the District Court of the United States for the Southern District of Ohio, it is ordered by the court that all further proceedings in this action be, and they are hereby, stayed.

¹ See *supra*

857. *Case dismissed when instituted after discharge in bankruptcy.*

[*Title.*]

And now it appearing to the court that the said defendant had obtained a discharge in bankruptcy before the filing of the petition herein, it is therefore ordered that this action be stricken from the docket for want of jurisdiction.

II. ASSESSMENT FOR STREET IMPROVEMENT.

858. (Sec. 2287.) Personal judgment, and order for sale.

859. (Sec. 2287.) Same, when assessment is payable in installments.

860. (Sec. 2287.) Decree enforcing lien.

861. (Sec. 2289.) Judgment, etc., when assessment irregular.

858. (Sec. 2287.) *Personal judgment, and order for sale, where council makes the assessment payable in one installment.*¹

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:]—The court further find that the assessment set forth in the petition is in all respects regular, and is a proper charge against the several defendants owning the several lots of land described in the petition, and is a lien upon the said lands respectively; and find that there is due to the plaintiff from the defendant, C. D., on account of said assessment, on the lot of land firstly in the petition described, with interest to the first day of this term, the sum of — dollars, and also the sum of — dollars penalty for the non-payment thereof, amounting in all to the sum of \$—, which sum is a lien upon the said lot.

It is therefore adjudged by the court * that the said plaintiff recover from the said defendant, C. D., the said sum of \$—, together with its costs herein expended. And in default of payment of said sum for — days, that the said lot of land be sold for the satisfaction of said judgment, and that an order issue therefor to the sheriff of — county, directing him to appraise, advertise, and sell such premises as upon execution, and bring the proceeds into court for further order.

¹As it may do by sec. 2264, 78 O. L. 259.

And the court find, that the assessment on the lot secondly (a) in the petition described, belonging to the defendant, E. F., amounts to \$250, and is a lien thereon. And the court find, upon the evidence adduced, that the value of the said lot of land, as assessed for taxation,¹ at the time the assessment was made [*or*, that the value of the said lot of land after the improvement was made],² was \$1,500, and that there is, therefore, due to the plaintiff from said defendant, C. D., on account of the said assessment, the one-fifteenth¹ [*or*, the one-tenth]² of said value, to wit, the sum of \$——, with interest from the —— day of ——, 18—, to the first day of this term, and also the sum of \$—— penalty for the non-payment of the same: amounting in all to the sum of \$——; the balance of said assessment to become payable [*as the court may order*].

It is therefore adjudged by the court * *conclude as from* * *above.*]

And the court find that the assessment on the lot thirdly in the petition described³ belonging to the defendant, G. H., amounts to four hundred dollars, and find upon the evidence adduced that the value of said lot as assessed for taxation¹ [*or*, after the improvement was made²] was fifteen hundred dollars; and that therefore the entire assessment chargeable on said lot being twenty-five per cent of its value, as above, is \$375; which sum is a lien thereon; the plaintiff being remitted to the city of —— for the balance of said assessment.

The court further find that there is due and payable to the plaintiff from the defendant, G. H., at the present time on account of said assessment the sum of \$——, being the one-fifteenth¹ [*or*, one-tenth²] of said value, with interest from the —— day of ——, 18—, to the first day of this term, and also

(a) This is a case where the assessment amounts to less than twenty-five and more than fifteen per cent of the value of the lot as assessed for taxation, as provided for in sec. 2270, 82 O. L. 155, or more than ten per cent of the value of the lot after the improvement was made, as provided for in sec. 2271, 82 O. L. 260.

¹See sec. 2270, as amended 82 O. L. 155.

²See sec. 2271, as amended 82 O. L. 260.

³This is a case where the assessment amounts to more than twenty-five per cent of the value of the lot as assessed for taxation, as provided for in sec. 2270, 82 O. L. 155, or more than twenty-five per cent of the value of the lot after the improvement is made, as provided for in sec. 2271, 82 O. L. 260.

\$—— penalty for the non-payment of the same, amounting in all to the sum of \$——, the balance of said assessment chargeable on said lot to become payable [*as court may order.*]

It is therefore adjudged by the court * [*conclude as from * above, and so with each lot separately.*]

859. (Sec. 2287.) *Personal judgment and order for sale where council makes the assessment payable in several installments.*¹

[*Title.*]

Finding III., page 99, or, if by default, *Finding IV.*, page 100, and continue:]—The court further find that the assessment set forth in the petition filed herein is in all respects regular and [in conformity with the terms of the petition for the improvement presented to the council, which said petition was properly signed by three-fourths in interest of the owners of the property abutting upon said — street as improved, and that said assessment²] is, to the extent hereinafter named, a proper charge against the several defendants owning the several lots of land described in the petition and a lien upon said lands respectively, and is payable in — equal annual installments³ [*or at other times as council may order*] as directed by said council. And the court find that the assessment on the lot firstly in the petition described,⁴ belonging to the defendant, C. D., amounts to \$250, and is a lien thereon, and that there is due to the plaintiff from said defendant, C. D., as the first annual installment of said assessment, the sum of — dollars, with interest from the — day of —, 18—, to the first day of this term, and also the sum of \$—— penalty for the non-payment of the same, amounting in all to — dollars. [*Add any judgment made by the court as to subsequent installments.*]

¹See sec. 2264, 78 O. L. 259.

²This clause to be used in case the petition for the improvement was filed under sec. 2272, as amended 82 O. L. 155.

³See sec. 2264, as amended 78 O. L. 259.

⁴This is a case where the petition for the improvement was not filed, under sec. 2272, as amended 82 O. L. 155, and where the assessment does not exceed twenty-five per cent of the value of the lot.

It is therefore adjudged by the court * [*conclude as from* * *in entry No. 858.*]

And the court find that the assessment levied by council on the lot secondly¹ in the petition described, belonging to the defendant, E. F., amounts to \$400, and the court find, upon the evidence adduced, that the value of said lot, as assessed for taxation² [*or, that the value of said lot after the improvement was made*³], was \$1,200, and that therefore the entire assessment chargeable on said lot, being twenty-five per cent of such value, is — dollars, which sum is a lien thereon; the plaintiff being remitted to the city of — for the balance of said assessment. And the court find that there is due to the plaintiff from the said E. F., as the first annual installment of said assessment, the sum of \$—, with interest from the — day of —, 18—, to the first day of this term, and also \$— penalty for the non-payment of the same, amounting in all to \$—. [*Add any order made as to the subsequent installments.*]

It is therefore adjudged by the court * [*conclude as from* * *in entry No. 858.*]

And the court find that that the assessment on the lot thirdly in the petition described,⁴ belonging to the defendant, G. H., amounts to \$300, and is to its full amount a lien thereon, the said E. F. having with others signed the petition for the improvement as above named, and that there is due to the plaintiff from the said G. H., as the first annual installment of said assessment, the sum of \$—, with interest from the — day of —, 18—, to the first day of this term, and also \$— penalty for the non-payment of the same, amounting in all to — dollars. [*Add any judgment of the court as to subsequent installments.*]

It is therefore adjudged by the court * [*conclude as from* * *in entry No. 858.*]

And the court find that the assessment on the lot fourthly

¹This is a case where the petition for the improvement was not filed, under sec. 2272, as amended 82 O. L. 155, and where the assessment exceeds twenty-five per cent of the value of the lot as listed for taxation, under sec. 2270, as amended 82 O. L. 155, or of the value of the lot after the improvement was made, under sec. 2271, as amended 82 O. L. 260.

²See sec. 2270, 82 O. L. 155.

³See sec. 2271, 82 O. L. 260.

⁴This is a case where a petition was filed, under sec. 2272, as amended, 82 O. L. 155, and where the assessment exceeds twenty-five per cent of the value of the lot after the improvement was made, and where the owner signed the petition for the improvement.

in the petition described,¹ belonging to the defendant, J. K., amounts to \$350. And the court find, upon the evidence adduced, that the value of the said lot after the improvement was made was \$1,200, and that the said J. K. did not sign the petition for said improvement, and therefore that the entire assessment chargeable on said lot is twenty-five per cent of such value, viz., \$300, and that to that extent it is a lien thereon, the plaintiff being remitted to the city of — for the balance of said assessment; and that there is due to the plaintiff from said defendant, G. H., as the first annual installment of said assessment, the sum of \$——, with interest from the — day of —, 18—, to the first day of this term, and also the sum of \$—— penalty for the non-payment of the same, amounting in all to — dollars. [*Add any judgment of the court as to subsequent installments.*]

It is therefore adjudged by the court * [*conclude as from* * *in entry No. 858. And so continue to find and decree with each lot separately.*]

861. (2289, as amended 80 O. L. 52.) *Judgment for amount properly chargeable, etc., when assessment is*
[*Title.*] *irregular.*

This cause coming on this day for hearing, was submitted to the court upon the pleadings and evidence without the intervention of a jury; on consideration whereof the court find that by reason of irregularity and defect in the proceedings of [*specify defect*] the assessment set up in the petition was not properly made against the said defendant or upon the lots of land sought to be charged, and is therefore invalid.

The court further find, from the evidence, that expense has been incurred in the improvement of said street, which is a proper charge against the several defendants and upon the several lots of land, in the petition described, in the amounts hereinafter found against each respectively.

And the court find that there is due to the plaintiff from the defendant, C. D., on account of expense incurred as aforesaid, properly chargeable against the lot of land firstly in the petition described, with interest to the first day of this term, the sum of ——— dollars.²

It is therefore considered, etc., [*enter judgment and order of sale as from* * *to end of paragraph in entry No. 858.*]

¹This is a case where the petition for the improvement was filed, under sec. 2272, as amended 82 O. L. 155, and where the assessment exceeds twenty-five per cent of the value of the lot after the improvement was made, and where the owner did not sign the petition for the improvement.

²The penalty can not be collected. *Uppington v. Oviatt*, 24 O. S. 232.

In all of the above cases the subsequent decrees of confirmation and distribution will be similar to the same decrees after sale on execution.

III. CHATTEL MORTGAGE.

In a suit to foreclose a chattel mortgage, where the court has jurisdiction of the parties in interest, it is not necessary to a decree of foreclosure that the mortgaged property should be within the territorial jurisdiction of the court.¹

862. *Judgment and decree for sale.*

[*Title.*]

After regular personal judgment, add :—

The court further find that the defendant executed the chattel mortgage, as stated in the petition, and that the same is a valid and subsisting lien on the property in the petition described; and that the plaintiff is entitled to have said chattel property sold to pay the amount due him as aforesaid.

It is therefore ordered that unless the defendant, within — days from the entry hereof, pay to said plaintiff said sum of \$——, with interest and costs of suit, the chattel property described in the petition shall be sold by the sheriff² of this county, as upon execution;³ and that an order issue for that purpose.

An entry confirming sale and distributing proceeds should be made. Follow forms in foreclosure of mortgage on real estate.

IV. CONVEYANCE OF REAL ESTATE.

863. Decree for conveyance.

864. Conveyance obtained by fraud set aside.

865. Decree reforming deed.

In order that a decree for conveyance shall operate as a conveyance, the land itself must be within the jurisdiction of the court; other-

¹ Means, Clark & Co. v. Worthington, 22 Ohio St. 622.

² Or it may be sold by a master commissioner, as in case of a sale on a real estate mortgage. See Means, Clark & Co. v. Worthington, *supra*.

³ Courts of equity, in ordering a sale of property, follow the rules regulating sales of similar property on execution when they are applicable. *Ib.*

wise, the conveyance must be enforced by attachment,¹ etc. The court may enforce obedience to its order requiring a conveyance to be made, by attachment for contempt, if it has acquired jurisdiction over the *person* of defendant, whether the lands ordered to be conveyed lie within or without the state.²

The decree for conveyance would undoubtedly, in a proper case, operate as a conveyance without a clause in it to that effect, by virtue of section 5318; but it is better to add to the decree an order to that effect.

Sec. 5399 also authorizes the court to order the conveyance to be made by a master commissioner, for which see entry under that section.

863. *Decree for conveyance of real estate.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:—and that the said plaintiff is entitled to the specific execution of the contract in the petition described.

It is therefore ordered, adjudged, and decreed, that upon full payment being made by the said A. B., etc. [*state specifically what the plaintiff is to do*], the said C. D. do, within — days from the date of this decree, convey the premises in the petition described to the said A. B., by a good and sufficient deed, with covenants of general warranty: * and, in default thereof, that this judgment have the operation and effect of such deed, and that the clerk have so much thereof as will show the transfer of title put on record in the office of the recorder of this county.³

It is further considered that the said plaintiff recover of the said defendant his costs herein expended.

864. *Conveyance obtained by fraud set aside.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:—And the court further find that the defendant, C. D., did obtain from the plaintiff the deed of conveyance in the petition described, by fraud and misrepresentation, as the plaintiff has in his petition alleged.

¹ *Daniels v. Stevens*, 19 Ohio, 222.

² *Randall v. Prior*, 4 Ohio, 424; followed and approved in *Penn v. Hayward* 14 Ohio St. 302.

³ By sec. 4138.

It is therefore adjudged and decreed that the said deed of conveyance, from the said A. B. to the said C. D., be, and the same is hereby, set aside, vacated, and declared to be of no force or effect in law to affect the title of the said premises, or to convey the same to the said defendant.

And it is further considered that the plaintiff recover of the said defendant his costs herein expended.

865. *Decree reforming deed.*

[*Title.*]

This cause came on this day to be heard upon the pleadings and proofs, and the court having carefully considered the same, and being fully advised in the premises, find that the deed referred to in the petition, for the premises therein described, was by mistake and inadvertence made to and in the individual name of the said C. D., instead of the joint names of the plaintiff, A. B., and said C. D.; that the said property was purchased with the joint means of the said plaintiff and said C. D., and belongs to them as late partners under the firm name of B. & D., each being entitled to the undivided half thereof; and that the said deed should properly so show and designate the same.

It is therefore adjudged and decreed by the court that the deed referred to in the petition, and recorded in Deed Book No. —, page —, — county, Ohio, records, be, and the same is hereby, corrected and reformed, so as to invest the plaintiff, A. B., with the undivided one-half of the premises therein described: and that this decree have the force and effect of a reformation and correction of said deed as fully and completely as though said deed had been made to the said A. B., and C. D. And the clerk is directed to have so much of this decree, as will show the change of title, put on record in the office of the recorder of this county.¹

It is further ordered that the costs of this proceeding be paid by —, and execution is awarded.

¹ By sec. 4138.

V. FOREIGN JUDGMENT.

An action may be maintained on a judgment rendered in this state, as well as on a judgment rendered in another state.¹

866. *Judgment on.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:]—

And the court further find that this plaintiff recovered a judgment against this defendant in the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, on the — day of —, 18—, for the sum of \$—; that said judgment is a valid and subsisting judgment, and that no proceedings are pending for its reversal or retrial, and that the amount therein found is legally due from this defendant to the plaintiff.

It is therefore considered that the plaintiff, A. B., recover from the defendant, C. D., the said sum of \$—, and interest from —, and also his costs herein expended.

VI. LEASEHOLD ESTATE.

867. Judgment forfeiting lease, and for damages.

868. Judgment for rent, and order for sale of.

The right of re-entry by a landlord, constituting a forfeiture, for non-payment of rent, can not exist, unless expressly so stipulated in the lease.²

The judgment may include forfeiture and rent, accruing subsequent to the right of re-entry, as damages.³

If the lessor has a lien on the leasehold premises for rent, the lien may be enforced by sale, as in other cases of lien. Sales of permanent leasehold estates, renewable forever, upon execution, or by order

¹ *Headly v. Roby*, 6 Ohio. 521.

² *Scott v. Wasson*, Union Common Pleas, 1861, 3 W. L. M. 148.

³ *Campbell v. McElevey*, 1859, 2 D. 574.

or decree of court, are governed by the same laws that govern such sales of estates in fee.¹

867. *Judgment forfeiting lease, and for damages.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:—The court further find that the plaintiff and the defendant executed the lease, in the petition set forth, and that under it said defendant entered into the possession of the premises described in the petition.

And the court further find that said defendants have, as set up in the petition, according to the terms of said lease, forfeited all their rights thereunder, and that said plaintiff has full right to re-enter upon said premises discharged of said lease.

The court further find that there is due the plaintiff from the defendant, for use and occupation of said premises since the plaintiff's right of re-entry therein accrued, with interest, the sum of — dollars.

It is therefore considered and decreed that the plaintiff recover from the defendant the possession of the said premises free and discharged of the lease mentioned in the petition, and that he also recover the sum of — dollars above found due as damages, and his costs herein expended, taxed at \$—.

It is further ordered that a writ of possession be issued to put the plaintiff in possession of said premises.²

868. *Judgment for rent, and order for sale of leasehold premises.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:—The court further find that there is due to the plaintiff from the defendant for ground rents to the — day of —, with interest to the first day of this term, the sum of — dollars, and that said rents are the first and best lien upon the leasehold premises described in the petition, with the improvements thereon.

It is therefore considered that the plaintiff recover from

¹ See. 5374.

² See note 6, p. 117.

the defendant the said sum of —— dollars, together with his costs in this behalf expended.

It is further ordered and adjudged that unless said defendant shall, within —— days from the entry of this decree, pay or cause to be paid, to the plaintiff, said sum so found due, with interest and costs, said leasehold premises, with the improvements thereon standing, shall be sold, and an order therefor shall issue to the sheriff of this county [*or, to A. D., a master commissioner of this court*], directing him to appraise, advertise, and sell said leasehold premises and improvements, as upon execution, and bring the proceeds into court for further order.

The further proceedings on confirmation will as in case of foreclosure of mortgage, if the leasehold estate sold is permanent and renewable forever. If the leasehold is a chattel only, the sale will be made as of other personal property on execution. But the sale should be returned to the court, and confirmation and distribution be made.

VII. MECHANIC'S LIEN.

876. Personal judgment, and decree for sale.

877. (Sec. 3189.) Order to lease premises.

The holder of a mechanic's lien may obtain a judgment for the amount of his account, as in other cases;¹ or may have an action and decree to enforce his lien, as in other cases of lien;² or may have his personal judgment and decree for sale in the same case, as in other cases.

876. *Personal judgment and decree for sale.*

[*Title.*]

Finding I., page 99, or, if by default, Finding IV., page 100, and continue:]—and that there is due to said plaintiff, from the defendant, C.D., on account of the materials furnished and labor performed, as set forth in the petition, the sum of \$——, and that the same is a lien on the premises described in the petition, by reason of the mechanic's lien therein described, and recorded in book ——, page ——, of the —— county records of liens; and that said plaintiff is entitled to have the said lien enforced.

It is therefore considered that the plaintiff, A. B., recover from the defendant, C. D., the said sum of —— dollars, together with his costs herein expended. And that unless the said judgment is paid within —— days from the entry hereof, an order may issue to the sheriff of —— county, Ohio, commanding him to sell said premises as upon execution.

¹Sec. 3197.

²Sec. 3206, 78 Ohio L 78. Decree may be same as No. 876, omitting the personal judgment.

and of his proceedings in the premises to make due return to this court.

And as to all questions of priority of liens, and as to the several amounts due to the other defendants to this suit, the cause is continued.

877. (Sec. 3189.) *Order to lease premises.*

[*Title.*]

It appearing to the court that the property subject to the mechanic's lien in this case will not sell on execution, by reason of a defective title, it is ordered * that the sheriff rent or lease the said premises, and collect the rents thereon, and pay the same into this court, until such rents and issues shall be sufficient to pay and satisfy the said lien.

VIII. NATURALIZATION.

[United States Revised Statutes, 380.]

878. (Sec. 2165.) Admission after declaration of intention.

879. (Sec. 2166.) Of discharged soldier.

880. (Sec. 2167.) Of party coming into United States under eighteen years of age.

881. (Sec. 2174.) Of seaman.

882. (Sec. 2165.) Where alien has borne hereditary title, etc.

The record of an alien's admission to citizenship must be made on the journal of the court.

878. (Sec. 2165.) *Admission after declaration of intention.*

In the matter of the citi-)
zenship of A. B.)

This day came A. B., a native of —, who declared his intention of becoming a citizen of the United States, according to law, before the — court of —, on the — day of —, 18—: and having proved good character and residence in the said United States for five years, and in the State of Ohio for one year, by the oath of E. F., took the oaths of renunciation and allegiance required by law, * and was admitted to citizenship.

879. (Sec. 2166.) *Admission of discharged soldier.*

[Title.]

This day came A. B., a native of —, and produced to the court satisfactory proof of his enlistment in the armies of the United States, and of his honorable discharge therefrom; and proving good character and residence of one year in the United States, by the oath of E. F., took the oaths of renunciation and allegiance required by law, * and was admitted to citizenship.

880. (Sec. 2167.) *Of party coming into the United States under eighteen years of age.*

[Title.]

This day came A. B., a native of —, and made declaration according to law of his intention of becoming a citizen of the United States, and proved such *bona fide* intention for two years last past, as well as good character and residence in the United States for five years, including three years immediately preceding his arrival at the age of twenty-one years, and continuously thereafter, by the oath of E. F., took the oaths of renunciation and allegiance required by law, * and was admitted to citizenship.

881. (Sec. 2174.) *Admission of seaman.*

[Title.]

This day came A. B., and produced to the court a certificate of having declared his intention of becoming a citizen of the United States before the — court of —, on the — day of —, 18—, and it appearing that subsequent thereto he has served for three years on board a merchant vessel of the United States, and now producing his certificate of discharge from, and good conduct during, said service, took the oaths of renunciation and allegiance required by law, * and was admitted to citizenship.

If the alien has borne any hereditary title or order of nobility, he must specially renounce the same.

882. (Sec. 2165, 4th.) *Where alien has borne hereditary title.*

[*Title.*]

*As in either of the former entries to *, and continue:]—and expressly renouncing the title [or, order of nobility] of — heretofore borne by him, was admitted to citizenship.*

One journal entry may be made for a number of cases, by ruling and heading columns for names, etc.

IX. REMOVAL AND RESERVATION OF CASES.

883. (Sec. 639 Rev. Stat. of U. S.) *Order removing to Circuit Court of the United States.*

884. (Sec. 454.) *Order of removal to the district court of another county.*

885. (Sec. 455.) *Case reserved to supreme court.*

Long and uniform usage has settled the practice, in this state, of effecting the transfer of causes falling within the constitutional jurisdiction of the federal courts, in the mode provided by the judiciary act of Congress of 1789.¹ (1 U. S. Stat. at Large, 73.) But see Revised Statutes, secs. 639–647, for the present legislation on the subject.

883. (Sec. 639, et seq., Rev. Stat. of U. S.) *Order removing case to Circuit Court of the United States.*

[*Title.*]

The defendant herein having, within the time provided by law, filed his petition for the removal of this case to the Circuit Court of the United States, and having at the same time offered good and sufficient surety, pursuant to statute: therefore, the court, finding that the defendant is a resident of the State of —, and that he is entitled to such removal, do hereby accept said petition and bond, and order that the said cause be removed for trial into the next Circuit Court of the United States, for the — District of Ohio, pursuant to the statutes of the United States; and all further proceedings in this court in said cause is hereby stayed.

The above form, by slight modification, may be used in all cases of removal to the circuit court.

¹ Hadley v. Dunlap, 10 Ohio St. 1.

884. (Sec. 454.) *Order of removal to the district court of another county.*

It appearing that two [*or more*] of the judges of this court are interested in the event of this cause, it is therefore ordered that the said cause be removed, for trial and judgment, to the district court held in the county of —.

885. (Sec. 455.) *Case reserved to supreme court.*¹

[*Title.*]

It appearing to the court that important [*or, difficult*] questions are involved in this case, on motion of the —, it is ordered that the said case be, and it hereby is, reserved, and ordered to be sent, to the supreme court of the state, for its decision on the same.

[Ordered, on motion of the —, that copies of the papers in this case be sent to the supreme court, instead of the originals.]

A similar entry may be made in a case where the judges of the district court are equally divided in opinion.

X. SPECIFIC PERFORMANCE.

A decree for specific performance on the part of the defendant, without finding or requiring performance on the part of the plaintiff of his part of the agreement, is erroneous.²

A specific performance may be decreed, though the decree is for the payment of money only, when the remedy at law is doubtful and difficult.³

886. *Decree for.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:—and that the agreements in the said pe-

¹ See Rule IX. of the supreme court.

² *Owens v. Hall*, 13 Ohio St. 571.

³ *Rees v. Smith*, 1 Ohio, 124.

tition mentioned, and duly proven in this action, can be fully performed and executed, and that the plaintiff is entitled thereto.

It is therefore considered and decreed that the plaintiff, A. B. do [*set forth what he is to do*], and that the defendant, C. D., do [*set forth what he is to do*].

It is further ordered that the — recover from the — his costs herein expended.

XI. STOCKHOLDER'S LIABILITY.

887a. (Sec. 3260.) *Judgment enforcing individual liability of stockholders.*

[*Title.*]

If the matter is heard on report of a master, make Entry No. 151, and continue :—

And upon said report, and the testimony offered, the court find that the amount of the indebtedness of the said — Company, a corporation under the laws of Ohio, over and above its assets, is — dollars, which includes a counsel fee of \$— to J. W., and the master's fee herein of \$—, which sums the court allow in favor of said counsel and said master commissioner.

And the court further find, from the evidence and report of said master commissioner, that each of the said defendants hereinafter named were, at the time said several liabilities accrued, stockholders of the said — Company in the amounts herein found and set opposite their names respectively, in the column of "stocks," in the schedule set out below.

And the court further find, from the report above named and the evidence, that said corporation is insolvent, and that to pay the liabilities aforesaid it will require an assessment on the amount of stock held by each and all of the defendants, stockholders, who are solvent and within the jurisdiction of the court, of the sums hereby found and set opposite their

names respectively, in the columns of "judgment," in the following schedule, viz.:

Name.	Stock.	Judgment.
W. M.	\$5,425.00	\$542.50
etc.	etc.	etc.

It is therefore ordered that each of the stockholders, defendants, named in the above schedule, pay on or before the — day of —, 18—, into the hands of J. B., who is hereby appointed a receiver for the purpose of receiving, collecting, and distributing the money to be paid in pursuance of this order, the sums above specified, set opposite his name in the judgment column of the schedule, together with interest from the — day of —, 18—; and, in default thereof, that execution issue therefor.

And it is further ordered by the court that out of the money so to be collected the receiver pay, first, the costs of this case, including the fees to the attorney and master commissioner in full, and that he pay then the money received by him to the several parties named below, pro rata, according to the sums set opposite their names respectively, and to which they are hereby found to be entitled, to wit:

- 1st. To D. E. the sum of \$—.
- 2d. To F. G. the sum of \$—.
- etc. etc.

XII. VENDOR'S LIEN.

887. *Decree for sale on.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:—The court also find that there is due from this defendant to said plaintiff, with interest to the first day of this term, the sum of — dollars, being the balance of unpaid purchase-money upon the premises described in the petition, to wit [*describe*], and that said plaintiff has a vendor's lien thereon for the same, which is the first and best lien on said premises: and that he is entitled to have the same sold for the payment and satisfaction of said lien. *

It is therefore ordered, adjudged, and decreed, that unless said C. D., or some one in his behalf, shall within — days from the entry of this decree pay to the said A. B. or his attorney the said sum of \$——, with interest from the first day of this term, and to the clerk of this court the costs of these proceedings, said premises shall be sold as upon execution, and an order shall issue therefor to the sheriff of — county; and that said sheriff bring the proceeds of said sale into court for further order.

The confirmation and distribution may be in the same form as in case of sale on mortgage.

XIII. VESTING PROPERTY IN TRUSTEES.

It is only attempted here to give a general form for a decree vesting property in trustees for the use and benefit of another. Every decree will be controlled by the circumstances of the particular case.

888. *Decree vesting property in trustees.*

[*Title.*]

Finding III., page 99, or, if by default, Finding IV., page 100, and continue:]—

Therefore it is ordered, adjudged, and decreed by the court that the real estate and personal property mentioned in the petition be vested in a trustee, to be by him held, controlled, and managed for the benefit of said plaintiff during her natural life, and after her death to be paid over and conveyed to her children. And it is ordered and decreed by the court that W. J. C. be, and he is hereby, appointed as the trustee for said property, on his giving an undertaking in the sum of \$——, with sureties to the approval of the court, conditioned for the faithful discharge of his duties as such. And the said defendant is hereby ordered to execute and deliver to said W. J. C., as trustee as aforesaid, within ten days from this date, a deed in due form of law, conveying to him all of said real estate in trust for the uses and purposes mentioned in this decree; and to deliver to him all of the personal property mentioned in said petition. And in default of such deed it

is ordered that this decree stand and operate, and have the force and effect of such deed.

And it is ordered that said trustee, on giving the undertaking aforesaid, do take immediate possession of all of said property; that he rent said real estate for the best price he can obtain therefor, and that he control and manage the same for the interest of the said A. B., and pay over to her from time to time the said rents, after payment of taxes, repairs, and other necessary expenses. And that he sell said personal property, and invest the moneys in good mortgage securities, and pay the interest arising from such investment from time to time to said plaintiff. [*State any other special powers.*]

And it is ordered that the costs of this case be paid by the —, and in default execution is awarded.

XIV. WILLS.

889. (Sec. 5935.) Order that will be admitted to probate.

890. (Sec. 5935.) Order refusing to admit will to probate.

In case of the refusal to admit a will to probate, an appeal lies to the court of common pleas, by sec. 5934. On trial in the common pleas an order may be made allowing or refusing the admission of the will to probate, as follows :

889. (Sec. 5935.) *Order, on appeal, that will be admitted to probate.*

[*Title.*]

This cause came on this day to be heard on appeal from the probate court of this county, and was submitted to the court upon the certified copy of the order made by the said probate court rejecting the will of A. B., which was offered for probate therein, and upon a certified copy of said will, and the testimony taken in the case. ❖

And thereupon the court, being fully advised in the premises, find that the will aforesaid was duly attested and executed, and that the testator, at the time of executing the same, was of full age and of sound mind and memory, and

not under any restraint, and it is therefore ordered and adjudged that said will be admitted to probate in said court, and that this order, together with the will and testimony, be certified by the clerk of this court to the probate court aforesaid.

It is further ordered that the —— pay the costs of this proceeding.

890. (Sec. 5935.) *Order refusing to admit will to probate,*

[*Title.*]

*As in last to *, and continue:—*

And thereupon the court find that [*name defect*], and therefore refuse to admit said will to probate.

It is further ordered that the --- pay the costs of this proceeding.

XVI. OATHS.

I. FOR A JURY.

II. FOR A WITNESS.

III. FOR AN INTERPRETER.

IV. FOR A REFEREE.

V. AFFIRMATION.

I. OATH FOR JURY IN CIVIL ACTION

You, and each of you, do solemnly swear, in the presence of Almighty God, that you will well and truly try the issue joined in the cause, wherein A. B. is plaintiff and C. D. is defendant, and a true verdict render according to the law and evidence.

II. OATH FOR WITNESS.

[Sec. 5260.]

You do solemnly swear, in the presence of Almighty God, that the testimony you are about to give the court shall be the truth, the whole truth, and nothing but the truth.

III. OATH FOR INTERPRETER.

You do solemnly swear, in the presence of Almighty God, that you will faithfully and truly interpret between the court and counsel and the witness in the case now on hearing.

IV. OATH FOR REFEREE.

[Sec. 5217.]

You do solemnly swear, in the presence of Almighty God, that you will well and faithfully hear and examine the cause

referred to you, wherein A. B. is plaintiff, and C. D. defendant, and make a just and true report therein, according to the best of your understanding.

V. AFFIRMATION.

[See sec. 1.]

You do solemnly and sincerely affirm, etc. [*as in any of the forms above*].

And this you do under the pains and penalties of perjury

JOURNAL ENTRIES

UNDER THE

CODE OF CRIMINAL PROCEDURE OF OHIO.

The first entry, after opening the journal for the proceedings of the criminal court,¹ is upon the return of the *venire facias* for the grand jury. The form is given under Chapter III., *post*. Usually, the next entry is upon the return of the *venire facias* for the petit jury, and the forms will be the same as under the Code of Civil Procedure.

The title of criminal cases, where the state prosecutes, is—

The State of Ohio }
 vs.
 C. D. }

In all journal entries under the Criminal Code, the crime with which the defendant is charged, or for which he has been indicted, should be set out after the title.

¹ In the same form as on page 7.

PART FOURTH

PENAL.

TITLE II.

CRIMINAL PROCEDURE.

CHAPTER I.

PROCEEDINGS TO PREVENT CRIME.

PEACE WARRANT—

891. (Sec. 7112.) Discharge on failure of prosecution.
892. (Sec. 7113.) Discharge from recognizance, on hearing in common pleas.
893. (Sec. 7113.) Order, on hearing, that party enter into security to keep the peace.
894. (Sec. 7116.) Person convicted of misdemeanor ordered to enter into recognizance to keep the peace.

PRIZE FIGHTS—

896. (Sec. 7117.) Order for recognizance that party will not engage in.
897. (Sec. 7117.) Order for discharge of accused after one month.

SEARCH WARRANT—

898. (Sec. 7126.) Order that certain things taken be destroyed.

PEACE WARRANT—

891. (Sec. 7112.) *Discharge, on failure of prosecution.*
[Title.] Charge of —.

The defendant now coming, in accordance with the condition of his recognizance, entered into before J. M., a justice of the peace, and filed with the clerk of this court, and the

said complainant failing to appear, to prosecute his said complaint, the said C. D. is hereby discharged from his said recognizance.

It is further ordered that the costs of this proceeding be paid by the said A. B., and execution is awarded therefor.

892. (Sec. 7113.) *Discharge from recognizance, on hearing in common pleas.*

[*Title.*] Charge of —.

Now comes the prosecuting attorney, on behalf of the State of Ohio, and also come A. B., the complainant, and C. D., the defendant, in accordance with the condition of the recognizance entered into by said defendant, before E. S., a justice of the peace, and filed in the office of the clerk of this court. And thereupon, upon full consideration of the evidence, * it is ordered that said defendant be discharged from his said recognizance.

It is further ordered that the costs of this prosecution be paid by the complainant, A. B.; and execution is awarded therefor.

893. (Sec. 7113.) *Order, on hearing, that party enter into security to keep the peace.*

[*Title.*] Charge of —.

*As in last to **, and *continue*:]—it is ordered and adjudged that the said C. D. do forthwith enter into recognizance in the sum of — dollars, with good and sufficient security, to be of good behavior and to keep the peace with all persons, and particularly with the said A. B., for the term of one year [*or other time*] next hereafter, [and in default of such security that he be committed to the jail of this county, there to remain until he shall comply with this order, or be otherwise legally discharged¹]; and that he pay the costs of this prosecution, for which execution is awarded.

¹ This clause, by sec. 7114, is put in the order, for convenience, when there is a probability that the bond will not be given. If bond is immediately given, it should be omitted.

If the security is at once given, add:]—

And thereupon came the said defendant, and with J. H. as his surety, approved by the court, entered into recognizance, as above required.

If recognizance be given at a subsequent day, use Entry No. 899.

By sec. 7116 any person convicted of a misdemeanor may be ordered to give security to keep the peace for any term not exceeding two years. The order may be added to the sentence of the court, or a separate entry may be made as follows:

894. (Sec. 7116.) *Person convicted of misdemeanor ordered to enter into recognizance to keep the peace.*

[*Title.*] Charge of —.

The said C. D., having heretofore been convicted of a misdemeanor in this court, it is now ordered and adjudged that he do forthwith enter into a recognizance in the sum of — dollars, with good and sufficient security, to keep the peace and be of good behavior for — months next hereafter; and that he stand committed to the jail of this county, there to remain until he shall comply with this order or be otherwise legally discharged.

If recognizance be at once given, add clause as after sec. 893. If subsequently given, use Entry No. 899 or No. 900.

PRIZE FIGHTS—

896. (Sec. 7117.) *Order for recognizance that party will not engage in prize fight.*

[*Title.*]

This day came the prosecuting attorney, on behalf of the State of Ohio, and the defendant, C. D., being brought before the Hon. R. A. J., one of the judges of the Court of Common Pleas for — County, Ohio, by the sheriff, charged with being about to engage as principal in a premeditated fight or contention, commonly known as a prize fight [*or, otherwise as provided for in sec. 7117*]; thereupon the case

came on for hearing on the affidavit of A. B. and the testimony. And finding the complaint to be true, it was ordered by said judge that the said C. D. should forthwith enter into recognizance in the sum of — dollars, with good and sufficient security, that he would not engage in any such fight or contention within one year in this state or elsewhere; and, in default of such recognizance, that he be committed to the jail of this county, there to remain until he should comply with such order or be legally discharged.

If the recognizance is entered into at once, the last clause may be omitted, and record of recognizance added, as after Entry No. 893. If given subsequently, use Entry No. 899.

897 (Sec. 7117.) *Order for discharge of accused after one month.*

[*Title.*]

And now, upon application to the Hon. —, one of the judges of the Court of Common Pleas for — County, Ohio, and it appearing that the defendant, C. D., is unable to give the recognizance heretofore ordered, and he having given proof, by his own affidavit and other evidence, that he will never engage in such fight or contention as charged in the complaint against him, and having entered into his own recognizance in the sum of — dollars, conditioned that he will not engage in any such fight or contention within one year in this state or elsewhere, he is discharged from his confinement.

SEARCH WARRANT—

When any things are destroyed or burned, under direction of the court, by section 7126, either a journal entry ordering the same should be made, or some report of the action made to the court, so as to show on the record the fact that it was done under the direction of the court. Entry may be made as follows:

898. (Sec. 7126.) *Order that certain things taken on search warrant be destroyed.*

[*Title.*]

It is ordered by the court that the [*specify things to be de-*

stroyed], heretofore found in possession of the defendant, C. D., and seized by virtue of a search warrant issued by R. M., justice of the peace, be burned by the sheriff of this court.

CHAPTER II.

ARREST, EXAMINATION, BAIL, AND COMMITMENT.

BAIL—

- 899. (Sec. 7164.) Record of recognizance taken by the court.
- 900. (Sec. 7164.) Record of one's own recognizance taken by the court.
- 901. Order for new recognizance at end of term.
- 902. (Sec. 7174.) Recognizance fixed in case of felony.

EXAMINING COURT—

- 903. (Sec. 7165.) Prisoner discharged by.
- 904. (Sec. 7165.) Prisoner admitted to bail by.
- 905. (Sec. 7165.) Prisoner remanded by.
- 906. (Sec. 7166.) Finding by, that prisoner was not *insane*
- 907. (Sec. 7166.) Finding by, that prisoner was *insane*.
- 908. (Sec. 7168.) Order fixing recognizance by.

RECOGNIZED PRISONER—

- 909. (Sec. 7177.) Delivered, and committed to jail.
- 910. (Sec. 7177.) Delivered, and new recognizance taken.
- 911. (Sec. 7178.) Delivered in vacation, etc., committed.
- 912. (Sec. 7178.) Delivered in vacation and recognized.
- 913. (Sec. 7180.) Recognizance forfeited.
- 914. Forfeiture opened up.

BAIL—

A recognizance in a criminal case, conditioned "that the prisoner appear on the first day of the next term, and thereafter from day to day, and abide the judgment of the court, and not depart the court without leave," is binding during the first term of the court only; and if the court adjourns without making any order, the sureties are exonerated from their recognizance.¹

¹Swank v. The State, 3 Ohio St. 429.

During the appearance term a new recognizance should be taken, or the prisoner be committed to jail,¹ if it is found necessary to continue his case to the next term.

Such recognizance may be taken either at the time of continuance, or at any day thereafter during the term. The prisoner may be called for that purpose after the continuance of the case, and if he fails to appear, his recognizance may be forfeited.¹ If he comes into court, and gives bond, without compulsion, an entry may be made in the same form as Entry No. 899, only saying, "entered into a new recognizance," etc. Otherwise, the court should order as in Entry No. 901.

Sec. 7164 of the Revised Statutes provides the method of recording a recognizance as follows: If taken by the court, by an entry on the journal. If received by the clerk, which probably includes all taken out of court, whether by a judge, a magistrate, a sheriff, or an examining court, by an entry on the appearance docket of the court. But in making up the complete record the prosecuting attorney or the accused may require that they be recorded in full.

899. (Sec. 7164.) *Record of recognizance taken by the court.*

[*Title.*] Charge of —.

This day came the defendant, and with J. H. as his surety, entered into recognizance before the court in the sum of — dollars, conditioned for his appearance [*state the time*], to answer said charge [*or name any other condition of the bond*].

900. (Sec. 7164.) *Record of one's own recognizance taken by the court.*

[*Title.*] Charge of —.

This day came the defendant, and entered into his own recognizance, before the court, in the sum of — dollars, conditioned for his appearance [*name time*], to answer said charge [*or name any other condition of the bond*].

901. *Order for new recognizance at end of term.*²

[*Title.*] Charge of —.

It being necessary to continue this case to the next term of this court, it is ordered that the said defendant do forth-

¹Swank v. State, 3 Ohio St. 429.

²See *supra*.

with enter into a new recognizance in the amount of the present one, for his appearance at the next term of this court, to answer the charge against him; and in default thereof, that he be committed to the jail of this county.

If the defendant appears in accordance with the above order, and gives bond, make the record of it as in Entry No. 899. If he fails to appear, his recognizance should be forfeited, as in Entry No. 913.

902. (Sec. 7174.) *Recognizance fixed in case of felony.*

[*Title.*] Indictment for felony.

The defendant herein not having been arrested or recognized upon the said indictment, it is ordered that the sheriff charged with the duty of arresting said defendant may recognize him, as provided by law, in the sum of — dollars.

EXAMINING COURT—

The code does not make very definite provisions for the entry of any order made by the examining court provided for in sections 7165-8, except the order fixing the amount in which the prisoner may be recognized, in section 7168. But all orders should probably be entered by the clerk on the records of the common pleas court, setting out the circumstances of each case. These sections do not apply to persons committed on indictment.¹

903. (Sec. 7165.) *Prisoner discharged by examining court.*

[*Title.*] Charge of —.

This day the defendant appeared before the Hon. J. M., probate judge² of this county, the clerk, and the prosecuting attorney, who, upon notice given by the sheriff [*or*, jailer] according to the statute in such cases made and provided, attended as an examining court for this purpose at the courthouse in the city of —. And the said judge, upon full examination of witnesses and consideration had, finding * no probable cause for holding the said C. D. to answer, thereupon discharged him from imprisonment.

¹ *Kendle v. Tarbell*, 24 Ohio St. 196.

² By sec. 7171, the judge of the court of criminal jurisdiction has concurrent jurisdiction with the probate judge.

904. (Sec. 7165.) *Prisoner admitted to bail by examining court.*
 [Title.] Charge of —.

*As in last entry to *, and continue:]*—probable cause for holding the said C. D. to answer, ordered that upon entering into recognizance in the sum of — dollars, with good and sufficient security, conditioned for his appearance forthwith¹ at [or, before the next term¹ of] the court of common pleas of this county, to answer said charge, he be discharged from confinement; otherwise that he be remanded to jail. [†]

Also the following named witnesses were recognized¹ in the several amounts, and with the sureties severally set opposite their names, for their appearance before the said court forthwith [or, at the next term thereof], viz.:

Name of witness.	Amount of recog.	Surety.
L. R.	\$300.	S. T.
etc.	etc.	etc.

905. (Sec. 7165.) *Prisoner remanded to jail by examining court.*
 [Title.] Charge of —.

*As in No. 903 to *, and continue:]*—probable cause for holding the said C. D. to answer, remanded him to jail.

[Conclude as from [†], in last entry.]

906. (Sec. 7166.) *Finding by examining court that prisoner was not insane, etc.*

[Title.] Charge of —.

*As in Entry No. 903 to *, and continue:]*—that the said C. D. was not insane when he committed the offense charged against him [or find according to facts], remanded him to the custody of the sheriff.

907. Sec. 7166.) *Finding of insanity by examining court.*

[Title.] Charge of —.

*As in Entry No. 903 to *, and continue:]*—that the said C. D. was, when he committed the offense charged and still

¹ By sec. 7167.

is, insane [*or specify other fact*], ordered that he be committed to ——— asylum.

908 (Sec. 7168) *Order fixing recognizance by examining court.*
[*Title.*] Charge of ———.

The defendant, C. D., having failed to give the security heretofore ordered by the examining court for his discharge from confinement, the said court ordered that the amount of such recognizance for his discharge, at any time hereafter, be fixed at the sum of ———, with security, to the approval of any judge discharging him.

For entry under sec. 7174, see Entry No. 902.

RECOGNIZED PRISONER—

909. (Sec. 7177.) *Delivered and committed to jail.*

[*Title.*] Indictment for ———.

This day came E. K., the surety for the defendant herein, and delivered up the body of the said defendant in open court, and asked to be discharged from further responsibility on his recognizance

And thereupon the court ordered that the said surety be discharged from his said obligation. * and ordered the said C. D. into the custody of the sheriff.

910. (Sec. 7177.) *Delivered, and new recognizance taken.*

[*Title.*] Indictment for ———.

*As in last to *, and continue :*—and fixed the bond of the said defendant, to be conditioned as the former, at \$——.

And thereupon the said C. D., with J. H. as his surety, entered into a new recognizance, as above, conditioned for his appearance [*state time*] to answer said charge.

When the delivery is made in vacation, as provided in section 7178, an entry at chambers should be made, so as to keep a full record of the case, as follows :

911. (Sec. 7178.) *Prisoner delivered in vacation, and committed.*

IN CHAMBERS, July 15, 18—.

Before the Hon. R. W., Judge of the Common Pleas Court of — County, Ohio.

[*Title.*] Indictment for —.

This day came E. K., the surety for the defendant herein, before the Hon. R. W., and delivered up the body of the said C. D., in the court-house of the said county, and asked to be discharged from further responsibility on his recognizance.

And thereupon the said E. K. was discharged from his said obligation, and the said C. D. * was committed to the jail of the county.

(Signed)

R., W., Judge.

912. (Sec. 7178.) *Prisoner delivered in vacation, and recognized.*

[*Title.*] Indictment for —.

As in last to *, and continue:]—with J. H. as his surety, entered into a new recognizance, in the sum of \$—, conditioned as the former, for his appearance at the next term of the court of common pleas, to answer said charge.

(Signed)

R. W., Judge.

913. (Sec. 7180.) *Recognizance forfeited.*

[*Title.*] Indictment for —.

And now comes the prosecuting attorney, on behalf of the State of Ohio, and presents to the court the recognizance of said defendant, taken before —, on the — day of —, 18—, in the sum of — dollars, with J. B. as surety.

Thereupon, the said defendant being three times solemnly called to appear and answer said charge as he agreed to do, and failing so to do, and J. B., the surety, being three times solemnly called to produce the body of said defendant as he agreed to do, and failing so to do, the court order that the said recognizance be, and the same hereby is, forfeited absolutely.

The court may add:]—

And that a capias be issued for said defendant.

The action under sections 7183-6 is a civil action. For the forms of orders and judgment, follow those given in the Civil Code.

914. *Forfeiture opened up, etc.*

[*Title.*] Indictment for —.

On motion to the court, by counsel for the defendant, the forfeiture of the recognizance heretofore entered herein is opened up and set aside.

And the defendant, C. D., with L. R., his surety, enters into recognizance before the court in the sum of — dollars, conditioned for his appearance [*some time*], to answer said charge.

CHAPTER III.

THE GRAND JURY AND ITS PROCEEDINGS.

FORMATION OF GRAND JURY—

915. Entry on return of *venire facias*.

916. (Sec. 7196.) Order appointing attorney to assist prosecuting attorney.

917. (Sec. 7197.) Order appointing assistant prosecuting attorney for county.

918. (Sec. 7201.) Order punishing witness refusing to answer, etc.

919. (Sec. 7202.) Juror sworn, in place of one sick, etc.

NEW GRAND JURY—

920. (Sec. 7203.) Entry on the formation of.

WITNESSES, RECORD OF—

REPORT OF GRAND JURY, AND PROCEEDINGS ON—

921. (Sec. 7210.) Entry, on report made.

922. (Sec. 7211.) Order discharging prisoner not indicted.

923. (Sec. 7211.) Order recognizing to next term.

FORMATION OF GRAND JURY—

The first entry after opening the minutes for criminal proceedings is on the return of the *venire facias* for the grand jury. For the manner of drawing, issuing for, and forming the grand jury, see sec. 5162, et seq. A general form is here given. A faithful record of all the proceedings should be made.

A grand juror may be punished for a contempt in the same manner

as a petit juror, as provided by section 5178. For the method of proceeding, see under the Civil Code, page 54, *ante*.

915. *Entry on return of the venire facias.*

The venire facias for a grand jury, heretofore issued, and returnable this day at 10 o'clock A. M., was duly returned by the sheriff, with his indorsement thereon, as follows, to wit :

18—, April 16th. Served the within named jurors as follows, etc. [*Copy the return in full.*]

And upon calling the same in open court, A. B., D. F., L. M., etc., appeared in answer thereto ; and, for good cause shown, the court excused D. F., and ordered that a rule issue for T. M., returnable to-morrow morning at 10 o'clock, to which time the remaining jurors were excused.

And the panel being incomplete, the court ordered a special venire facias¹ to issue to fill up the same, returnable to-morrow morning at 10 o'clock ; whereupon the clerk issued a special venire facias for the following named persons, to wit : M. N., etc.

Or, if there be no rule or attachment, or other cause of delay, the special venire may be made returnable forthwith, and its return be made a part of the above. If returnable at a future day, it may be a separate entry, as follows :

And now the special venire facias, heretofore ordered by the court, was duly returned by the sheriff, with his indorsement thereon, as follows, to wit :

18—, April 18th. [*Copy the return, and continue as on the return of a regular venire.*]

Or, when the panel is incomplete:]—

And the panel being incomplete, the sheriff summoned as talesmen,¹ to complete the same, the following named persons, who appeared in answer thereto, to wit : R. S., etc.

And the panel being full, the court appointed R. H. fore-

¹ See sec. 5171.

man¹ of the grand jury, and he, with his fellow jurors, took the oaths in manner and form as prescribed by law;² and the said jury being instructed by the court in relation to their duties, were conducted to their room, attended by the sheriff.

The following named persons compose the grand jury, to wit:

1. H. S., foreman of the grand jury.
2. M. D., etc.

916. (Sec. 7196.) *Order appointing attorney to assist prosecuting attorney.*

[Title.]

In this case, it being the opinion of the court that the public interest requires it, J. E. is hereby appointed to assist the prosecuting attorney in the trial of the accused.

917. (Sec. 7197.)³ *Order appointing assistant prosecuting attorney for county.*

In the matter of the appoint-
ment of assistant prose-
cuting attorney. }

And now, it being shown to the court that it is necessary for the proper performance of the duties incumbent upon the office of prosecuting attorney of this county, that an assistant should be appointed, the court, upon careful consideration of the premises, hereby appoint R. S. as such assistant, at a yearly salary of — dollars.

And now came the said R. S., and gave his bond as such assistant prosecuting attorney in the sum of — dollars, with T. H. and L. E. as sureties, to the approval of the court, and also took the oath of office.

918. (Sec. 7201.) *Order punishing witness refusing to answer, etc.*

In the matter of the con-
tempt of L. S. }

And now came L. S. before the court, in custody of the

¹ By sec. 7190.

³ Section since repealed.

² Secs. 7191 and 7192; also, see *post*, page 488.

sheriff, charged with contempt of court in refusing to answer as a witness before the grand jury.

And the said L. S. being examined touching his said refusal, and other evidence being heard, on consideration thereof, the court find that he is thereby guilty of a contempt of court.

It is therefore ordered * that a fine of \$——¹ be imposed upon the said E. F. for this, his said contempt, and that he pay the cost of this proceeding; for both of which execution is awarded.

Or, * that the said E. F. be imprisoned in the jail of this county,¹ there to remain until he shall submit so to answer, or be otherwise duly discharged.
ingly

919. (Sec. 7202.) *Juror sworn in place of one sick, etc.*

It appearing that G. H., one of the grand jurors heretofore impaneled and sworn, is unable, by reason of sickness, further to attend thereon, it is ordered that L. B. be sworn in the stead of the said G. H. as such grand juror.

NEW GRAND JURY—

920. (Sec. 7203.) *Entry on the formation of.*

It being deemed necessary, the court this day ordered the sheriff to call together a new grand jury by summoning from among the bystanders or neighboring citizens fifteen good and lawful men having the qualifications of grand jurors:

Whereupon, the following named persons were called, and appeared in answer thereto, to wit:

1. R. M.,

2. L. R., etc.

And the court appointed R. M. foreman of the said grand jury, and he, with his fellow jurors, took the oaths, in manner and form as prescribed by law; and the said jury being

¹ See sec. 5254.

instructed by the court in relation to their duties, were conducted to their room, attended by the sheriff.

WITNESSES, RECORD OF—

A daily record of the witnesses sworn to testify before the grand jury may be kept by an entry in the journal, thus :

Record of Witnesses.

The following named witnesses were this day sworn to testify before the grand jury, to wit :

1. A. B.,
2. C. D., etc.

REPORT OF GRAND JURY, AND PROCEEDINGS ON—

921. (Sec. 7210.) *Entry, on report made.*

This day appeared at the bar of this court the grand jury heretofore impaneled and sworn in, and for the body of the county aforesaid, viz. :

1. H. S.,
2. M. D., etc.,

and presented to the court, through their foreman, H. S., their certain bill of indictment against G. H., for burglary, indorsed, "A true bill. H. S., foreman of the grand jury."

And also their certain other bill of indictment against J. T., for grand larceny, indorsed, "A true bill. H. S., foreman of the grand jury."

[*Copy report in full.*]

When the work of the jury is completed, add:]—

And there being no further business for the said jury, they were discharged finally.

922. (Sec. 7211.) *Order discharging prisoner not indicted, etc.*

[*Title.*] Charge of —.

No indictment having been found against this defendant, he is hereby discharged.

923. (Sec. 7211.) *Order recognizing to next term.*

[*Title.*] Charge of —.

No indictment having been found against this defendant, the court order that upon entering into recognizance in the sum of — dollars, with sufficient security for his appearance to answer the charge against him at the next term of the court, he be discharged from his imprisonment.

CHAPTER IV.

INDICTMENT AND PROCEEDINGS THEREON.

924. (Sec. 7212.) *Order for election between two indictments.*

925. (Sec. 7212.) *Entry of election.*

926. (Sec. 7212.) *Entry of order, and election.*

927. (Sec. 7216.) *Prisoner discharged for variance.*

A motion to quash an indictment upon arraignment thereon, addresses itself to the sound discretion of the court, and is never granted except in very clear cases.¹

924. (Sec. 7212.) *Order for election between two indictments.*²

[*Title.*] Indictment for —.

It appearing to the court that there are pending against this defendant two indictments for the same crime, it is ordered that the prosecuting attorney elect upon which he will proceed to trial.

925. (Sec. 7212.) *Entry of election.*

[*Title.*] Indictment for —.

Now comes the prosecuting attorney, in accordance with the former order of the court, and elects to proceed to trial against this defendant upon the indictment filed in this case, to wit, that of —.

If the election is made at the time of the order, the entry may be as follows :

¹ Ex parte Bushnell, 8 Ohio St. 599.

² Bailey v. The State, 4 Ohio St. 440.

926. (Sec. 7212.) *Entry of order, and election.*

[*Title.*] Indictment for —.

Now comes the prosecuting attorney, and it appearing that there are pending against this defendant two indictments for the same crime, and the said prosecuting attorney being required to elect upon which indictment he will proceed to trial, elects to proceed upon that of —, as filed in this case.¹

927. (Sec. 7216.) *Prisoner discharged for variance, etc.*

[*Title.*] Indictment for —.

This cause coming on for hearing on the motion to quash the indictment herein, and the court finding that there is a variance between the statement in the indictment and the evidence² offered, which is material and prejudicial to the substantial rights of the defendant, the motion is granted; and the defendant is discharged.

CHAPTER V.

PROCEEDINGS BETWEEN INDICTMENT AND TRIAL.

WHEN PRISONER INSANE—

928. (Sec. 7240.) Order for jury to try question.

929. (Sec. 7240.) Entry on verdict as to sanity.

PLEAS TO THE INDICTMENT—

930. (Sec. 7245.) Counsel assigned.

931. (Sec. 7252.) Indictment quashed—prisoner committed.

932. (Sec. 7252.) Indictment quashed—prisoner bailed.

933. Motion to quash overruled.

934. (Sec. 7252.) Plea in abatement sustained—prisoner committed.

935. (Sec. 7252.) Same—prisoner bailed.

936. (Sec. 7254.) Name corrected, on plea in abatement.

937. (Sec. 7256.) Demurrer overruled, and plea of "not guilty."

938. Demurrer sustained, and defendant discharged.

¹ Upon trial being had upon the indictment elected, the other one will be quashed.

² As to variance in the name of defendant, see sec. 7254. and Entry No. 936; see also sec. 7303, and Entry No. 955.

ARRAIGNMENT—

939. (Sec. 7260.) Verdict for defendant on plea in bar and order for discharge.
940. (Sec. 7260.) Verdict against defendant on plea in bar, and plea of “guilty” or “not guilty.”
941. (Sec. 7261.) Plea of guilty, and prisoner remanded.
942. Plea of guilty, and sentence.
943. Plea of guilty of smaller offense.
944. (Sec. 7262.) Plea of not guilty.
945. Plea of not guilty retracted, and plea of guilty entered.

CHANGE OF VENUE—

946. (Sec. 7263.) Order for.
947. (Sec. 7266.) Recognizances of witnesses.

WHEN PRISONER INSANE—

928. (Sec. 7240.) *Order for jury to try question.*

[*Title.*] Indictment for —.

This day came C. W. G., the attorney for the defendant, and suggested to the court that the defendant in this case is not sane, and also presented the certificate of J. P., M. D., to the same effect. Thereupon, it is ordered that a jury be impaneled to try whether or not the said C. D. is sane, and the hearing is set down for Saturday, June 24, inst., to which time it is directed that the venire be made returnable.

Upon return of venire, make a journal entry as in No. 97, etc.

If a struck jury is demanded, follow the forms given on page 53.

929. (Sec. 7240.) *Entry of verdict as to sanity.*

[*Title.*] Indictment for —.

This day came the defendant herein in charge of the sheriff, and his attorney; also came the jury heretofore impaneled in this case, to wit:

1. R. S.,

7. C. O.,

2. J. D.,

8. S. W.,

etc.,

etc.,

and were duly sworn according to law.

And thereupon, after hearing the evidence and the charge of the court upon the question whether the defendant is or is not sane, the jury retired to their room in charge of the sheriff for deliberation.

And afterward came the said jury into open court and by their foreman presented their verdict in writing as follows, to wit :

“ We, the jury, find that the defendant, C. D., is [*or is not*] sane.
R. S., Foreman.”

930. (Sec. 7245, 77 O. L. 59.) *Counsel assigned.*

[*Title.*] Indictment for —.

And now the defendant being brought into court in charge of the sheriff, and it appearing that he is in indigent circumstances, and unable to employ counsel, the court, at his request, appoint R. S., Esq., as counsel for his defense.

931. (Sec. 7252.) *Indictment quashed—prisoner committed.*

[*Title.*] Indictment for —.

And now this cause coming on for hearing on the motion of the defendant to quash the said indictment, the court being fully advised in the premises, * grant the same. The court further order that the defendant be committed to the custody of the sheriff.

932. (Sec. 7252.) *Indictment quashed—prisoner bailed.*

[*Title.*] Indictment for —.

*As in last to *, and continue :*]—grant the same. The court further order that the defendant be held to bail in the sum of — dollars for his appearance on the first day of the next term of this court, to answer the charge against him : and in default thereof that he be committed to the custody of the sheriff.

If the recognizance be at once given, add :—

And thereupon the defendant, with J. H. as his surety, entered into recognizance in accordance with the above order.

933. *Motion to quash overruled.*

[*Title.*] Indictment for —.

*As in No. 931 to *, and continue :*]—overrule the same.

934. (Sec. 7252.) *Plea in abatement sustained—prisoner committed.*

[*Title.*] Indictment for —.

This case being this day heard upon the indictment and

the plea in abatement thereto, the court find upon the evidence for the defendant.* It is further ordered that said defendant be committed to the custody of the sheriff.

935. (Sec. 7252.) *Same—prisoner bailed.*

[*Title.*]

*As in last to *, and continue:]*—The court further order that said defendant be held to bail in the sum of — dollars for his appearance on the first day of the next term of this court, to answer the charge against him; and in default thereof that he be committed to the custody of the sheriff.

If the recognizance be at once given, add:]—

And thereupon the defendant, with J. H. as his surety, entered into recognizance in accordance with the above order.

936. (Sec. 7254.) *Name corrected, on plea in abatement.*

[*Title.*] Indictment for —.

This cause being heard on the plea of the defendant, and the court being satisfied thereby that the true name of said defendant is E. F., it is ordered that the correction be made; and that in all further proceedings under this indictment said defendant be designated by the name of E. F.¹

After the above amendment, the title of the case will be:¹

The State of Ohio

against

E. F., who is indicted by the name of C. D.

937. (Sec. 7256.) *Demurrer overruled, and plea of “not guilty.”*

[*Title.*] Indictment for —.

This cause coming on for hearing upon the demurrer to the indictment, the court, on consideration thereof, overrule the same. And thereupon the said defendant being brought into court in custody of the sheriff, and being arraigned upon said indictment, for plea thereto, saith he is not guilty, and puts himself upon the country, and the prosecuting attorney doth the like.

¹ See *Lasure v. The State*, 19 Ohio St. 43.

938. *Demurrer sustained, and defendant discharged.*¹

[*Title.*] Indictment for —.

This cause coming on for hearing on the demurrer to the indictment, the court, upon consideration thereof, sustain the same. It is therefore adjudged that the said C. D. be, and he hereby is, discharged.

ARRAIGNMENT—

939. (Sec. 7260.) *Verdict for defendant on plea in bar, and order for discharge.*

[*Title.*] Indictment for —.

Now comes the prosecuting attorney, on behalf of the State of Ohio, and the defendant being brought into court in custody of the sheriff, and arraigned upon said indictment, offered a plea in bar thereto.

And thereupon the case came on for hearing upon the issue made by said plea and the reply of the prosecuting attorney; also came the following named persons as jurors, to wit:

1. J. R.

etc.

7. W. L.

etc.

who were duly impaneled and sworn, according to law.

And the said jury, having heard the testimony adduced, the argument of counsel, and the charge of the court, after deliberation thereon, returned their verdict in writing, signed by their foreman, as follows : *

“ We, the jury, find on the issue joined in this case for the defendant. J. R., Foreman.”

And therefore it is ordered and adjudged that said defendant, C. D., be discharged.

940. (Sec. 7260.) *Verdict against defendant on plea in bar, and plea of “ guilty ” or “ not guilty.”*

[*Title.*] Indictment for —.

*As in last to *, and continue :]*—

“ We, the jury, find on the issue joined in this case against the defendant. J. R., Foreman.”

And thereupon the said C. D., being asked by the court

¹ *Quære*: After demurrer sustained, has the court the discretion of holding the prisoner in custody until another indictment can be found?

if he is guilty or not guilty of the offense charged against him, saith he is "guilty;" and is remanded to the custody of the sheriff until sentence.

[Or, saith he is "not guilty," and puts himself upon the country, and the prosecuting attorney doth the like.]

941. (Sec. 7261.) *Plea of guilty, and prisoner remanded.*

[*Title.*] Indictment for —.

Now comes the prosecuting attorney, on behalf of the State of Ohio, and the defendant being brought into court in custody of the sheriff, and arraigned upon said indictment, for plea thereto, saith * he is "guilty:" and is remanded to the custody of the sheriff until sentence.

942. *Plea of guilty, and sentence.*

[*Title.*] Indictment for —.

*As in last to *, and continue:*]—he is "guilty:" thereupon [after hearing testimony and being fully advised in the premises¹], it is ordered and adjudged by the court that the said C. D. [sentence as in one of the forms, post, p. 47.

943. *Plea of guilty of smaller offense.*

[*Title.*] Indictment for stabbing.

*As in No. 941 to *, and continue:*]—he is guilty of assault and battery; which plea is accepted by the prosecuting attorney, and the said C. D. is remanded to the custody of the sheriff until sentence.

944. (Sec. 7262.) *Plea of not guilty.*

[*Title.*] Indictment for —.

*As in No. 941 to *, and continue:*]—he is "not guilty;" and puts himself upon the country, and the prosecuting attorney doth the like.

If counsel is then assigned, add: [sec. 7245.]

And it appearing that said defendant is in indigent circumstances, and unable to employ counsel, the court, at his request, assign J W. as counsel to defend him.

¹ See note 1, p. 479.

945. *Plea of not guilty retracted, and plea of guilty entered.*

[*Title*.] Indictment for —.

Now comes the prosecuting attorney, on behalf of the State of Ohio, the defendant being brought into court in custody of the sheriff; thereupon said defendant retracts his plea of not guilty heretofore entered, and for plea to said indictment, saith he is guilty of assault and battery, which plea is accepted by the prosecuting attorney; and the said defendant is remanded to the custody of the sheriff until sentence. [*Or sentence may be pronounced.*]

CHANGE OF VENUE—

946. (Sec. 7263.) *Order for change of venue.*¹

[*Title*.] Indictment for —.

On motion of the —, and it being made to appear to the court, by affidavits, that a fair and impartial trial of this case can not be had in this county, it is ordered and directed that the venue herein be, and the same is hereby, changed to the adjoining county of —. And on application of the prosecuting attorney therefor, R. W., Esq., is hereby appointed to assist in the further prosecution of the case.² And it is ordered that the witnesses for the state enter into recognizance to appear before the court of common pleas of the said county of —.³

947. (Sec. 7266.) *Recognizances of witnesses taken.*

[*Title*.] Indictment for —.

This day came the witnesses herein, and entered into recognizance before the court in the amounts, and with the sureties, severally set opposite their names, conditioned for their appearance on the — day of —, 18—, before the

¹ Where parties are jointly indicted, the court has power, upon good cause shown, to order a change of venue as to either of the defendants, upon his motion alone. Such motion and order necessarily involve and include a motion and order for a separate trial of the party making the motion, and have all the force and effect of a motion and order for both purposes. *Brown v. The State*, 18 Ohio St. 496.

² By sec. 7264.

³ By sec. 7266. It is better to make the order as notice to the witnesses.

Court of Common Pleas of the County of —, to which the venue of this case has been changed, viz. :

Names of Witnesses.	Amount of Recog.	Names of Sureties.
1. C. D.	\$300.	R. A.
etc.	etc.	etc.

CHAPTER VI.

TRIAL, AND PROCEEDINGS INCIDENT THERETO.

JURIES—

948. Jury formed, in capital cases.

EVIDENCE—

- 949. (Sec. 7283.) Order for jury to view place.
- 950. (Sec. 7290.) Order for subpoena for person in penitentiary, etc.
- 951. (Sec. 7293.) Commission to take testimony.
- 952. (Sec. 7295.) Prisoner discharged to become state's witness.

TRIAL—

- 953. (Sec. 7301.) Leave to be tried when absent, or by the court.
- 954. (Sec. 7302.) Separate trials ordered.
- 955. (Sec. 7303.) Indictment quashed, and prisoner detained.

EXCEPTIONS—

- 956. (Sec. 7304.) Bill of exceptions allowed, etc.
- 957. (Sec. 7306.) Attorney appointed to argue case, etc.

ACQUITTAL WITHOUT TRIAL—

- 958. (Sec. 7309.) Prisoner discharged, if not tried, etc.
- 959. (Sec. 7310.) Same, when recognized.
- 960. (Sec. 7311.) Application for discharge refused.

JURIES—

A jury is made up for the trial of every capital case specially ;¹ and the entries on the return of the venire must be made under the title of

¹Sec. 7267.

the case. A form similar to the following may be used, but the clerk should in each case make a full record, in the most intelligible form, of the proceedings had.

948. *Jury formed in capital case.*

[*Title.*] Indictment for murder in the first degree.

This day came the prosecuting attorney, on behalf of the State of Ohio, the defendant, C. D., being brought into court in custody of the sheriff, and his counsel also coming.

And the venire¹ for the jury in this case heretofore issued according to law, returnable this day, was duly returned by said sheriff, with his indorsement thereon as follows: [*copy in full.*]

And said venire being called in open court, all of the above-named persons appeared in answer thereto, except F. G., J. H., etc.; and the court ordered that a rule be issued for F. G., directing him to appear forthwith to show cause for his failure to obey the writ of this court.²

And also the alias venire³ heretofore issued according to law, returnable this day, was duly returned by said sheriff, with his indorsement thereon, as follows: [*copy in full.*]

And said alias venire being called in open court, all of the above-named persons appeared in answer thereto.

And upon the further call of said venire, and said alias venire, for cause shown, the court excused R. T., etc., and the defendant, by his counsel, challenged G. H. for cause, and the challenge was sustained; and also challenged peremptorily D. E., etc.; and R. L. and J. B. being separately tried were accepted as jurors in this case. And it appearing to the court that there were not thirty-six qualified jurors present, it was ordered⁴ [on motion of the defendant] that the clerk draw from the box, as in other cases, a suffi-

¹ Directed by sec. 7268.

² See sec. 5641 in connection with sec. 5178. For further proceedings against a juror, see p. 54.

³ Directed by sec. 7268.

⁴ See sec. 7269.

cient number of ballots to make the number of competent jurors thirty-six, and that a venire issue, returnable [*name day*].

And thereupon the court adjourned the further hearing of the case until to-morrow morning at 10 o'clock.

Second day.

[*Title.*] Indictment for murder in the first degree.

This day again came the prosecuting attorney, on behalf of the State of Ohio, the defendant being brought into court in custody of the sheriff, and his attorney also coming. Also came R. L. and J. B., heretofore accepted as jurors in this case.

Continue with record of all proceedings had until the jury is complete, and then say:]—and the jury being complete, the following named persons having been tried and accepted, to wit:

1. R. L.

2. J. B., etc,

were duly impaneled and the following oath administered to them: “You shall well and truly try, and true deliverance make, between the State of Ohio and the prisoner at the bar, C. D., so help you God.”¹ And the trial proceeded, etc.

IN OTHER CRIMINAL CASES—

By section 7276 the same forms of summoning and impaneling juries are had as in civil cases. See under Civil Code.

EVIDENCE—

949. (Sec. 7283.) *Order for jury to view place, etc.*

[*Title.*] Indictment for —.

It being proper, in the opinion of the court, for the jury to have a view of the place in which [*any material fact*] occurred, it is ordered that said jury be conducted in a body, under the charge of the sheriff, to the said place; and that the same be

¹ See sec. 7281. See also the case of *Wareham v. The State*, 25 Ohio St. 601

shown to them by F. G. And that they return to-morrow morning at 10 o'clock.

950. (Sec. 7290.) *Order for subpoena for person confined in penitentiary, work-house, or prison.*

[*Title.*] Indictment for —.

It being necessary to procure the testimony in this case of M. S., now confined in the penitentiary, it is ordered that a subpoena be issued, directed to the warden of the penitentiary [*or*, superintendent or keeper of work-house or prison], commanding him to bring the said M. S. before the court.

951. (Sec. 7293.) *Commission to take testimony.*

[*Title.*] Indictment for —.

On application of the defendant, by his counsel, and it appearing that G. F. is a material witness in his behalf, and that he now resides in Lexington, Kentucky, the court hereby appoint the mayor of said Lexington a special commissioner, and direct that a commission be issued to him, to take the testimony of said G. F., upon interrogatories and cross-interrogatories on file, and which shall be annexed to said commission, at some convenient place in said city, on or before the — day of —, A. D. 18—, and return the same to this court duly certified.

And it is ordered that notice of this order be given to the prosecuting attorney — days before such examination.

952. (Sec. 7295.) *Prisoner discharged to become state's witness.*

[*Title.*] Indictment for —.

It appearing to the court that the defendant, E. F., is willing to become a witness for the state in the prosecution of his co-defendant upon being discharged therefrom himself, it is ordered that a *nolle prosequi* be, and is hereby, entered herein as to said E. F.

TRIAL—

953. (Sec. 7301.) *Leave to be tried when absent, or by the court.*

[*Title.*] Indictment for —.

The defendant, C. D., now comes by his attorney, and presents to the court his written request to be put upon trial in his absence [*or*, be tried by the court], being in words as

follows, to wit [*copy in full*], and the said request is granted by the court.

954. (Sec. 7302.) *Separate trials ordered.*

[*Title.*]

On application to the court by the defendant, E. F., the court orders that a separate trial be had of each defendant herein.

955. (Sec. 7303.) *Indictment quashed and prisoner detained.*

[*Title.*] Indictment for —.

On motion, and it appearing to the court that a mistake has been made in charging the proper offense in the indictment against this defendant, the said indictment is hereby quashed, and the jury discharged. But it appearing that there is good cause to detain the said defendant in custody, it is ordered that he enter into recognizance to answer to the offense on the first day of the next term of this court, in the sum of \$——. Otherwise, that he be committed to jail.

And it is ordered that the witnesses for the state enter into recognizance to appear at the same time and testify.

EXCEPTIONS—

956. (Sec. 7304.) *Bill of exceptions allowed, etc.*

[*Title.*] Indictment for —.

See Entry No. 192, Civil Code.

957. (Sec. 7306.) *Attorney appointed to argue case, etc.*

[*Title.*] Indictment for —.

The prosecuting attorney having presented his certain bill of exceptions in this case to the supreme court, and the supreme court having allowed such bill to be filed, G. P., one of the attorneys of this court, is hereby appointed to argue said case against the prosecuting attorney before said court.

ACQUITTAL WITHOUT TRIAL—

958. (Sec. 7309.) *Prisoner discharged if not tried, etc.*

[*Title.*] Indictment for —.

The defendant herein having been indicted [*state the time when*]

and not brought to trial, and the continuance [*or*, delay] not being caused by his act, he is hereby discharged.¹

959. (Sec. 7310.) *Same, when recognized.*

[*Title.*] Indictment for —.

The defendant herein not having been brought to trial, and this being the — term of the court after his indictment, he is hereby discharged from his recognizance.¹

960. (Sec. 7311.) *Application for discharge refused.*

[*Title.*] Indictment for —.

This cause being heard on the application of the defendant for discharge on the indictment against him, and the court being satisfied that there is material evidence, on the part of the state, to be had at the next term, and which can not now by reasonable diligence be had, the said application is refused: and the said defendant is remanded to the custody of the sheriff [*or*, admitted to bail for his appearance to answer said charge at the next term of this court].

CHAPTER VII.

VERDICT AND JUDGMENT, AND PROCEEDINGS THEREON.

VERDICT—

961. General entry on return of verdict when given on the day the trial begun.

CAUSE PROGRESSED—

962. Cause progressed; second or succeeding day.

FORMS OF VERDICTS.

- I. General verdict.
- II. Guilty on one count.
- III. Guilty of a degree inferior to the charge.
- IV. Guilty of an attempt.

¹ This is not a mere temporary release from confinement, but a final judgment in the cause, and a bar to all subsequent prosecutions for the same crime or offense. *Ex parte McGehan*, 22 Ohio St. 442.

SENTENCE—

963. (Sec. 7319.) Pronounced on verdict.

964. Pronounced on plea of guilty.

965. Nolle prosequi.

FORMS OF SENTENCE.

I. Imposing fine.

II. Same, and order committing till paid.

III. Sending to jail.

IV. Sending to the penitentiary.

V. Sentence of hanging.

EXECUTION OF SUSPENDED SENTENCE—

966. (Sec. 7321.) Addendum suspending sentence for a misdemeanor.

967. (Sec. 7325.) Addendum suspending sentence for a felony.

968. (Sec. 7324.) Order carrying suspended sentence into execution.

969. (Sec. 7325.) Escaped prisoner re-sentenced when captured.

970. (Sec. 94.) Record of reprieve.

EXECUTION OF DEATH SENTENCE—

971. (Sec. 7344.) Time fixed for execution of escaped prisoner.

CONVICT INSANE OR PREGNANT—

972. (Sec. 7346.) Insanity found, execution suspended.

973. No insanity found.

VERDICT—

When a jury is discharged before verdict, for the reason of sickness of a juror, or other accident or calamity, or because they can not agree, as specified in section 7313, use the forms in the Civil Code,¹ being careful to state the cause of the discharge; otherwise the discharge will operate as an acquittal of the defendant.²

It may also be well to add: "without prejudice to the prosecution of this case."

961. *General entry on return of verdict: when given on the day that the trial is begun.*

The State of Ohio	}	Indictment for —.
vs.		
C. D.		

Now came the prosecuting attorney on behalf of the State

¹ See page 59.

² *Hines v. The State*, 24 Ohio St. 134.

of Ohio, and the defendant with his counsel; [or *say*, the defendant being brought into court in custody of the sheriff;] also came the following named persons as jurors, to wit:

1. J. R.,

7. W. L.,

etc.,

etc.,

who were duly impaneled and sworn according to law.

And the said jury having heard the testimony adduced by the parties, the arguments of counsel, and the charge of the court, retired to their room in charge of the sheriff¹ for deliberation.

And afterward came the jury, conducted into court by the sheriff,² and returned the following verdict in writing, signed by their foreman, to wit:

“We, the jury, on the issues joined, find, etc.” [*See forms, page 478.*]

[Signed,]

B. F., Foreman.

If the jury be polled, add, after the verdict:— [By sec. 7314.]

Whereupon, on the request of the prosecuting attorney [or, the defendant], the court ordered that the jury be polled. And upon each juror being called by name, and inquired of if the verdict just read was his verdict, each for himself separately answered, “It is.”

If the verdict be “guilty,” add:—

And thereupon said defendant is ordered into the custody of the sheriff to await sentence.

If the verdict be “not guilty,” add:—

And there being no further charge against said defendant, he is hereby discharged.

CAUSE PROGRESSED—

If the trial is not completed on the day it is begun, the journal should show each day's progress, as in civil cases.³

962. *Cause progressed: second or succeeding day.*

[*Title.*] Indictment for ———.

This day again came the prosecuting attorney on behalf of

¹ See sec. 7312.

² See sec. 7314.

³ See pages 56 and 57.

the State of Ohio, and the defendant with his counsel; [or *say*, the defendant being brought into court in custody of the sheriff;] also came the jury heretofore impaneled and sworn, and the trial proceeded.

[*Let the entry show the stage of proceeding reached as in civil cases, until verdict is reached, which enter in the form given above in Entry No. 961.*]

FORMS OF VERDICTS.

I. GENERAL VERDICT—

We, the jury, on the issue joined, find the defendant guilty [or not guilty] as he stands charged in the indictment.

II. VERDICT OF GUILTY ON ONE COUNT—

We, the jury, on the issue joined, find the defendant guilty of —, as he stands charged in the — count of the indictment, and not guilty on the — count.

*In case of larceny, embezzlement, or obtaining property by false pretense, add:—*and we do assess the value of the said property at — dollars.¹

III. VERDICT OF GUILTY OF A DEGREE INFERIOR TO THE CHARGE—²

We, the jury, on the issue joined, find the defendant not guilty of —, as he stands charged in the indictment, but find him guilty of —.

IV. VERDICT OF GUILTY OF AN ATTEMPT—²

We, the jury, on the issue joined, find the defendant not guilty of arson, as charged in the indictment, but we find him guilty of an attempt to commit arson.

SENTENCE—

963. (Sec. 7319.) *Sentence pronounced on verdict.*

[*Title.*] Indictment for —.

The defendant herein having been heretofore convicted of

¹ By sec. 7315. If the verdict does not state the value of the property stolen, judgment rendered on the verdict will be reversed on error. *Armstrong v. The State*, 21 Ohio St. 357.

² By sec. 7316.

——, was this day brought into court, in custody of the sheriff, and informed by the court of the verdict of the jury and inquired of * if he had any thing to say why judgment should not be pronounced against him; and having nothing but what he hath already said: [*or, showing no good and sufficient cause why judgment should not be pronounced:*]

It is therefore adjudged by the court, etc. [*For forms of sentence, see below.*]

964. *Sentence pronounced on plea of guilty*

[*Title.*] Indictment for ——.

The defendant herein having on a former day of this term entered a plea of guilty to the charge of the indictment in this case, was this day brought into court in custody of the sheriff; and [the court having heard the testimony adduced,¹ and being fully advised in the premises, and the said defendant] being inquired of, etc. [*Conclude as from *, in No. 693.*]

965. *Nolle prosequi.*

[*Title.*] Indictment for ——.

Nolle prosequi is entered herein, by order of court, at request of the prosecuting attorney.

FORMS OF SENTENCE.

I. IMPOSING FINE—

—that the said defendant, C. D., pay a fine of —— dollars, and the costs of this prosecution: * and execution is awarded.²

II. SAME, AND ORDER COMMITTING TILL PAID—³

*As in last to *, and add.:*]—and that he stand committed to the jail of —— county until the amount of said fine and costs shall be paid, or secured to be paid, or he be otherwise legally discharged.

¹ As provided by sec. 7320, in mitigation of sentence, when the offense is punishable, either in whole or in part, by fine.

² By sec. 7328.

³ Sec. 7327.

III. SENDING TO JAIL—

—that the said C. D. be imprisoned in the jail of — county [and kept at hard labor]¹ for the term of — months; and that he pay the costs of this prosecution,² for which execution is awarded.

IV. SENDING TO THE PENITENTIARY—

—that the said defendant, C. D., be imprisoned and confined in the penitentiary of this State, and kept at hard labor, but without any solitary confinement, [or, kept at hard labor for the period of —, and also be kept in solitary confinement in the cells of the penitentiary without labor,] for the period of —;³ and that he pay the costs of this prosecution,³ for which execution is awarded.

V. SENTENCE OF HANGING—

—that the defendant, C. D., be taken hence to the jail of — county, and be therein confined in solitary confinement until conveyed as prescribed by law to the Ohio Penitentiary at Columbus, Ohio,⁴ where he shall be securely kept until —. the — day of —, A. D. 18—; and that on that day he be taken thence by the sheriff to the place of execution, and there, between the hours of — and —, on the day last named, he be hanged by the neck until he is dead. That he pay the costs of this prosecution,³ and execution is awarded therefor.

EXECUTION OF SENTENCE SUSPENDED—

If defendant give notice to the court of his intention to file, or apply for leave to file, a petition in error, the court may, by sec. 7321, add to the entry of sentence as follows:

¹ By sec. 6800.

² See sec. 6799. The statute does not require sentences of imprisonment to commence *in presenti*; and it should not be so construed, where no present effect can be given to such sentence, by reason of another subsisting judgment of imprisonment. It is not error, upon a conviction in a criminal case, to make one term of imprisonment commence when another terminates. But the judgment must show clearly what other sentence is referred to. *Williams v. The State*, 18 Ohio St. 46.

³ By sec. 6799.

⁴ By sec. 7339, 82 O. L. 169

966. (Sec. 7321.) *Addendum suspending sentence for a misdemeanor.*¹

And the said defendant now giving notice of his intention to apply for a writ of error, on motion, it is ordered that, upon a recognizance being given by the said C. D. in the sum of \$—, with security to the approval of the court [*or*, clerk], conditioned according to law, the execution of the sentence herein be suspended until [*state time*].

967. (Sec. 7325.) *Addendum suspending sentence for a felony.*¹

And the said defendant giving notice of his intention to apply for a writ of error, on motion, it is ordered that the execution of the sentence herein be suspended until —; and that the said C. D. be committed to the custody of the sheriff, to be imprisoned until such time as the said matter shall be disposed of.

968. (Sec. 7324.) *Order carrying suspended sentence into execution.*

[*Title.*] Indictment for —.

The defendant in this case having been sentenced at the last [*or*, at a former] term of this court, and the sentence having been then suspended, on motion of the defendant, and no writ of error upon said judgment having been allowed [*or*, the said judgment having been affirmed by the supreme court, to which a writ of error was taken], it is therefore ordered that the said sentence be now carried into execution.

969. (Sec. 7325.) *Escaped prisoner re-sentenced when captured.*

[*Title.*] Indictment for —.

The defendant herein having been heretofore convicted of —, and sentenced by the court, and having thereafter escaped before confinement in the penitentiary; and the said defendant being this day again brought into court in the custody of the sheriff, it was ordered that the former sentence against him be set aside. And the said defendant being inquired of * if he had any thing to say why judgment should not

¹ For suspension of sentence after petition in error is filed, see secs. 7361-3, and entries Nos. 982 and 933.

be pronounced against him, and having nothing but what he hath already said [*or, and showing no good and sufficient cause why judgment should not be pronounced*]:

It is therefore considered and adjudged by the court, etc. [*For forms of sentence, see ante, pages 479 and 480.*]

970. (Sec. 94.) *Record of reprieve.*

[*Title.*] Indictment for murder in the first degree.

This day came the sheriff, and presented to the clerk of this court a certain warrant of reprieve, granted by the governor of this state to this defendant, C. D., now under sentence of death in this court; which said reprieve is in the following words, to wit: [*copy in full.*]

EXECUTION OF DEATH SENTENCE—

971. (Sec. 7344.) *Time fixed for execution of escaped prisoner.*

[*Title.*] Indictment for murder in the first degree.

The defendant herein having been heretofore sentenced to be hung, and having subsequently escaped, now comes the sheriff, and makes return of the re-arrest of the said defendant. It is therefore ordered that the said C. D. be kept in solitary confinement in the jail of — county, until the — day of —, A. D. 18—, and that on that day he be taken thence, by the sheriff, to the place of execution designated in the former judgment of this court, and there, between the hours of — and —, on the day last named, he be hanged by the neck until he is dead.

CONVICT INSANE OR PREGNANT—

The proceedings to determine the sanity or insanity of a prisoner sentenced to death are had out of court, by a judge and jury, with the clerk of the court, the sheriff, and the prosecuting attorney. The judge certifies his orders, and the clerk enters the finding of the jury, with the orders on the journal of the court. The same forms are used in case of a female convict found pregnant.

972. (Sec. 7346.) *Insanity found, and execution suspended.*

[*Title.*] Indictment for —.

The sheriff of this court having on a former day, to wit,

the —— day of ——, 18—, given notice to the Hon. A. H., one of the judges of this court, of the apparent insanity of the said C. D., now came, before the said A. H. judge, the prosecuting attorney, on behalf of the State of Ohio, the said C. D., in charge of the sheriff, and his attorney, S. C.; also came the following named persons, summoned as jurors by said sheriff, to wit [*namo jurors*], who were duly impaneled and sworn to try the issues to them presented. And thereupon this cause came on further to be heard on the evidence touching the insanity of the said C. D.

And the said jury having heard all the evidence, after consultation had thereon, presented their finding in writing, signed by themselves, as follows:

“We, the jury, find upon the evidence that the prisoner C. D., * is insane.”

And thereupon the said A. H., judge, made and certified the following order, to wit:

“It is ordered, upon the finding of the jury of the insanity of the prisoner, C. D., that execution of the sentence of death heretofore pronounced upon him be, and hereby is, suspended until a warrant shall be received from the governor of this state directing such execution. And the said C. D. is remanded to the custody and safe-keeping of the said sheriff.”

973. *No insanity found.*

[*Title.*] Indictment for ——.

*As in last to *, and conclude :]*—is of sound and sane mind.”

And thereupon the said A. H., judge, made and certified the following order, to wit:

“It is ordered, upon the finding of the jury in these proceedings, that the said proceedings be dismissed, without prejudice to the execution of the sentence of the court against the prisoner, C. D.”

CHAPTER VIII.

NEW TRIALS, MOTIONS IN ARREST, AND ERROR.

NEW TRIALS—

974. (Sec. 7350.) Order granting.

975. Motion for new trial overruled, and sentence pronounced.

MOTIONS IN ARREST—

976. (Secs. 7353 and 5.) Motion granted; order for recognizance.

977. (Secs. 7353 and 5.) Motion granted; defendant discharged.

ERROR—

978. (Sec. 7359.) Order fixing day for return of summons in error.

979. (Sec. 7360.) Judgment affirmed.

980. (Sec. 7360.) Judgment reversed.

981. (Sec. 7360.) In capital case, judgment affirmed, and day fixed for execution.

982. (Sec. 7362.) Order by court of error suspending sentence in capital case.

983. (Sec. 7362-3.) Same, in other case.

NEW TRIAL—

974. (Sec. 7350.) *Order granting new trial.*

[*Title.*] Indictment for —.

This cause being heard on the motion for a new trial, the court, on consideration, and for good cause shown, grant the same. The said verdict is accordingly vacated, and a new trial granted.

975. *Motion for new trial overruled, and sentence pronounced.*

[*Title.*]

This cause came on this day to be heard on the motion for a new trial, and the court, after full consideration, overrule the same.

And thereupon, the defendant being in court in the custody of the sheriff, was informed by the court of the verdict of the jury, and inquired of if he had any thing to say why judgment should not be pronounced against him, and hav-

ing nothing but what he hath already said [*or, showing no good cause why judgment should not be pronounced*] :

It is therefore adjudged by the court, etc.

[*For forms of sentence, see pages 479 and 480.*]

MOTIONS IN ARREST—

976. (Secs. 7353 and 7355.) *Motion granted, and order for recognizance.*

[*Title.*] Indictment for —.

This cause being heard on the motion in arrest of judgment, the court, upon good cause shown, allow the same.

And it appearing from the evidence that there is sufficient reason to believe said defendant guilty of an offense, it is ordered that he enter into a recognizance, with sufficient security, conditioned for his appearance on the first day of the next term of this court; or in default thereof that he be committed to the jail of the county.

977. (Secs. 7353 and 7355.) *Motion granted, and defendant discharged.*

[*Title.*] Indictment for —.

This cause being heard on the motion in arrest of judgment, the court, upon good cause shown, allow the same.

It is thereupon further ordered that said defendant, C. D., be discharged.

ERROR—

978. (Sec. 7359.) *Order fixing day for return of summons in error.*

[*Title.*] Indictment for —.

On motion of —, and good cause shown, it is ordered that summons in error in this case be returned on the — day of —, 18—.

979. (Sec. 7360.) *Judgment affirmed.*

[*Title.*] Error.

This cause came on for hearing upon the petition in error, the transcript, and the original papers and pleadings¹ from

¹ See sec. 7358.

the Court of Common Pleas of — County, and was argued by counsel; on consideration whereof, the court find there is no error apparent on the record in said proceedings and judgment.

It is therefore considered by the court that the judgment aforesaid be, and the same hereby is, affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at \$——.¹

980. (Sec. 7360.) *Judgment reversed.*

[*Title.*] Error.

This cause came on for hearing upon the petition in error, the transcript, and the original papers and pleadings from the Court of Common Pleas of — County, and was argued by counsel; on consideration whereof, the court find that there is error apparent upon the face of the record² to the prejudice³ of the plaintiff in error.

It is therefore considered by the court that the judgment aforesaid be reversed and held for naught.

It is thereupon further ordered that said defendant be discharged.

[*Or*, It is thereupon further ordered that said defendant be granted a new trial.]

981. (Sec. 7360.) *In capital case, judgment affirmed and day fixed for execution.*

[*Title.*] Error.

As in No. 979 to end, and continue:—

And the day fixed for the execution of the said C. D. having passed, the court appoint the — day of —, 18—, between the hours of — and —, as the time for carrying out the former sentence of the Court of Common Pleas of — County in this case. And it is ordered that a warrant be issued accordingly.

¹ As to carrying sentence into execution see sec. 7324, and Entry No. 968.

² Error must appear affirmatively on the face of the record. *Bartlett v. State*, 28 Ohio St. 669; *Bond v. State* 23 Ohio St. 349.

³ Also, that it was to the prejudice of the party seeking to take advantage of it. *Berry v. State*, 31 Ohio St. 219; *Cantwell v. State*, 18 Ohio St. 477.

982. (Sec. 7362, 82 O. L. 39.) *Order, by court of error, suspending sentence in capital case.*

[*Title.*] Error.

On motion of the plaintiff in error, by his attorney, and notice thereof having been given to the prosecuting attorney of — county, and upon good cause shown, it is this day ordered by a majority of the judges of this court that the execution of the sentence of the Court of Common Pleas of — County, against the defendant herein, be suspended for [*name time*].

983. (Sec. 7362-3.) *Order, by court of error, suspending sentence in cases other than capital.*

[*Title.*] Error.

On motion of the plaintiff in error herein, it is ordered that execution of the sentence of the court below, in this case, be suspended until [*name time*].

*And, in case of misdemeanor, add:—*upon defendant entering into recognizance, according to law, in the sum of \$——.

OATHS.

I. OF THE FOREMAN OF THE GRAND JURY.

II. OF THE OTHER GRAND JURORS.

III. OF THE PETIT JURY.

IV. AFFIRMATION.

I. OF THE FOREMAN OF THE GRAND JURY [See sec. 7191.]—

You solemnly swear, in the presence of Almighty God, that, saving yourself and fellow jurors, you, as foreman of this grand inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The counsel of the state, your own, and your fellows, you shall keep secret, unless called on in a court of justice to make disclosures; and you shall present no person through malice, hatred, or ill-will, nor shall you leave any person unrepresented through fear, favor, or affection, or for any reward or hope thereof; but, in all your presentments, you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding.

II. OF THE OTHER GRAND JURORS [See sec. 7192.]—

The same oath which A. B., your foreman, hath now taken before you on his part, you, and each of you, shall well and truly observe and keep on your respective parts. And this you swear in the presence of Almighty God.

III. OF PETIT JURY [See. sec. 7281.]

You, and each of you, do solemnly swear that you shall well and truly try, and true deliverance make, between the

State of Ohio and the prisoner at the bar, C. D.; so help you God.

IV. AFFIRMATION [See sec. 7282.]—

“ You do solemnly and sincerely affirm,” etc., and close with “ this you do as you shall answer under the pains and penalties of perjury.”

SUPERIOR COURT OF CINCINNATI.

So far as the jurisdiction of this court is the same as the common pleas, the same journal entries are used. Those here given are such only as are not used in that court.

ERROR FROM SPECIAL TO GENERAL TERM—

By sec. 499a, §2 O. L. 23, the jurisdiction of the general term as a court of error is restored as it formerly existed. Exceptions may be taken in special term in the same manner as in the court of common pleas, for which see page 91. The bill of exceptions will be in form as in the common pleas, page 493 *et seq.*, and the entry allowing the bill of exceptions in the form of entry No. 192, p. 91. But it is not necessary to file a transcript of the proceedings, the petition in error being heard upon the original files, pleadings, and proceedings in special term.

RESERVATION FROM SPECIAL TO GENERAL TERM; BILL OF EVIDENCE—

When evidence is taken in special term, and the case reserved on the same for decision in general term,¹ a bill of the evidence is made up and certified by the judge who tried the case, to be correct, and is then filed.

This bill is in no sense a bill of exceptions, and can not be made part of the record,² until it comes to be a part of the bill of exceptions from general term to the supreme court. No journal entry is required of its filing, except as it is noticed in the entry of reservation.

The form of the bill of evidence may be as follows:

BILL OF EVIDENCE.

Superior Court of Cincinnati.

A. B. <i>vs.</i> C. D.	}	Bill of Evidence.
------------------------------	---	-------------------

Be it remembered, that on the trial of this action at the — term, 18—, of the Superior Court of Cincinnati, before

¹By virtue of sec. 503.

²But see *quarre* in the case of *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio, 382, 385.

the Hon. M. F. F., judge, the plaintiff, to maintain the issue on his part, called A. R. as a witness, who, being duly sworn, testified as follows: [*Give a full statement of the testimony in narrative form, or set out categorically the questions and answers, as deemed best.*]

And the plaintiff, further to maintain the issue on his part, offered in evidence the deposition of M. N., which was read, and which is hereto attached and made part hereof, marked "Exhibit A;" and also offered in evidence the contract between, etc. [*or other paper*], and the agreements of —, 18—, thereto attached, which is hereto attached and made part hereof, marked "Exhibit B."¹

And thereupon the plaintiff rested.

And the defendant, to maintain the issue on his part, offered, etc. [*in some form as above.*]

And thereupon the defendant rested.

And thereupon the plaintiff, further to maintain, etc.

And thereupon the plaintiff rested.

And the aforesaid is all the evidence offered in the case by both plaintiff and defendant.

It is hereby certified by me, one of the judges of the Superior Court of Cincinnati, that the above and foregoing is a full and correct statement of all the evidence by either party upon the hearing of this case adduced.

M. F. F., [SEAL.]

Judge of the Superior Court of Cincinnati.

[Date.]

The entries of reservation may be as follows :

¹ Exceptions taken and objections made to any part of the evidence may be put in the certificate in the same form as in a bill of exceptions. See *post*.

984. (Sec. 503, 82 O. L. 24.) *Entry of reservation on bill of evidence.*¹

[*Title.*]

This cause coming on for hearing on the pleadings and evidence, and the evidence being heard, and the court finding that important questions of law [*or fact, or of law and fact*], arise in the case, it is hereby ordered that the same be, and they hereby are, reserved and adjourned, upon the certified bill of evidence filed herein, for the decision of the court in general term.

985. (Sec. 503, 82 O. L. 24.) *Entry of reservation on motion, etc.*¹
[*Title.*]

This cause coming on for hearing on the motion for a new trial [*or other questions*], and it appearing to the court that important questions of law [*or fact, or of law and fact*] arise in the case upon said [*motion*], it is hereby ordered that the same be, and they are hereby, reserved and adjourned for the decision of the court in general term.

REMOVAL TO COURT OF COMMON PLEAS—

986. (Sec. 502.) *Order for removal.*

[*Title.*]

On motion of the —, and it appearing to the court that all of the judges of the superior court are interested in the event of this action, it is hereby ordered that the case be removed for trial into the Court of Common Pleas of this county.

ENTRIES IN GENERAL TERM—

The following formulæ may be used, in making entries in general term, otherwise the entries will be the same as in the circuit and common pleas courts.

FORMULA IN RESERVED CASES.

[*Title.*]

This cause came on for hearing as reserved from special term upon the certified bill of evidence herein [*or upon the*

¹It is customary to file a certified copy of this entry in general term.

motion for new trial, *or otherwise*], and on consideration thereof, etc. *Continue as in similar cases in other courts.*

FORMULA IN ERROR CASES.

[*Title.*]

This cause came on to be heard upon the petition in error, the original pleadings, and papers, and was argued by counsel; on consideration whereof the court find, etc. [*Continue as in similar cases in the circuit court.*]

For forms of judgment affirmed see Nos. 821 and 822.

For forms of judgment reversed see No. 815, *et seq.* But in case final judgment is entered in general term the case need not be remanded for execution.

ERROR FROM GENERAL TERM TO THE SUPREME COURT.

Final orders and judgments of the Superior Court of Cincinnati are reviewed in the same manner as those of the circuit courts. See sec. 503, 82 O. L. 24

If the case went from special to general term on error, no further bill of exceptions will be required, the evidence being already put on record, and the record in general term showing the action taken there.

If the case went from special to general term by reservation, the bill of exceptions for the supreme court will be made up as if the general term were the original court, the certified bill of evidence with its exhibits being annexed to, and made part of, the bill of exceptions. See form on page 499.

APPENDIX.

The following is given as a general form for a bill of exceptions, containing the more frequent kinds of evidence introduced, exceptions and rulings of the court.

BILL OF EXCEPTIONS.

1. Witness offered; testimony given.
2. Question objected to; objection sustained.
3. Testimony ruled out.
4. Deposition offered in evidence; part objected to.
5. Affidavit offered in evidence.
6. Contract or other paper offered in evidence.
7. Deed or other paper offered in evidence and rejected.
8. Witness or other evidence offered and rejected.
9. Record of another case given in evidence.
10. Defendant's evidence.
11. Plaintiff's further evidence.
12. Charge requested by party and given.
13. Charge requested by party and refused; exceptions.
14. Charge requested by party and modified.
15. Charge given by the court and excepted to.
16. Verdict and judgment; motion for new trial overruled, and allowance of the bill.

FORM.

State of Ohio, Hamilton County, Court of Common Pleas.

A. B. }
 vs. } Bill of Exceptions.
 C. D. }

Be it remembered that on the trial of this action at the — term, 18—, of the — court of —, Hon. J. D., judge, presiding, the plaintiff to maintain the issue on his part called as a witness

1. A. R.,
 who being duly sworn, testified as follows :

[Give a full statement of the testimony in narrative form, showing the direct, cross, and re-examination, or set out categorically the questions and answers, as deemed best.]

¹ It is not proper practice, in taking a bill of exceptions, to set out the testimony, unless the objection be to the admission of irrelevant testimony. The proper practice is to set out the facts proven. *Nye v. Watt*, W. 437.

If the testimony is written out separately, and attached as an exhibit

2. And at this point in the examination¹ the plaintiff, proposing to prove that, etc.,² asked the following question of the witness A. R., to wit :

[*State question.*]

and the defendant objecting to said question, the court sustained the objection, and the plaintiff at the time³ excepted⁴ to said ruling of the court, on the ground that, etc.⁵

to the bill, and contains any statement reciting rulings of the court in admitting or excluding evidence, it should be referred to as containing "the testimony with the exceptions of counsel, and the rulings of the court in admitting and excluding evidence." See *Dunn v. State*, 23 Ohio St. 167.

When the statute requires certain examination of witnesses to be recorded, they are a legitimate part of the transcript or record of the proceedings, without any bill of exceptions setting them out. *Howell v. Fry*, 19 Ohio St. 556.

¹The bill must show as much of the evidence as to show the true state of the case at the time, and the right to introduce the evidence. *Landis v. Dayton*, W. 659.

²There should be a statement of what it is proposed to prove, when a question is asked which is objected to, and the objection sustained, and an exception taken. *Gandolfo v. State*, 11 Ohio St. 114.

Where only the question excluded and the answer are set out in the bill of exceptions, and no other evidence is stated, so that the connection of the evidence claimed to be competent might be seen, and the court of errors placed in a position to decide whether the evidence was properly rejected, the exception can not be allowed. *Coston v. Page*, 9 Ohio St. 397.

³A decision or ruling of a court, not excepted to at the time, can not be assigned for error in a reviewing court. Code, sec. 5298. *Templeton v. Kraner*, 24 Ohio St. 554, 564.

And it must appear from the bill of exceptions that an exception was taken. *Geauga Iron Co. v. Street*, 19 Ohio, 390.

⁴All the errors relied on must be assigned in the bill of exceptions; for the court of error will not go beyond those assigned. *Humiston v. Anderson's Adm'rs*, 15 Ohio, 556, 559; *Randall v. Turner*, 17 Ohio St. 262; *Levi v. Daniels*, 22 Ohio St. 38.

⁵Whether it is necessary or not to state the ground of this and every exception taken, attorneys must judge, until the Supreme Court speaks more decidedly on the point. In the case of *Adams v. The State*, 25 Ohio St. 584, 587, the *dictum* of the court leans very strongly that way.

3. And thereupon the defendant moved the court to rule out so much of the testimony of A. R. as [*set forth part*] and the court on consideration granted said motion, and the plaintiff at the time excepted to said ruling of the court.¹

4. And the plaintiff, further to maintain the issue on his part, offered in evidence and read the deposition² of M. N., which is hereto attached and made a part hereof,³ marked "Exhibit A."

The defendant by his counsel objected when the same was offered to the admission of the following portion of the deposition, to-wit:

"Question, etc. Answer, etc.," [*or specify in any way the part objected to*], which objection was overruled [*or sustained*] by the court, and said testimony admitted [*or ruled out*], to which ruling of the court and admission [*or rejection*] of testimony, the said — at the time excepted.

5. The plaintiff also offered in evidence and read the affidavit⁴ of N. P., which is hereto attached and made part hereof, marked "Exhibit B."

6. And the plaintiff further to maintain the issue on his part also offered in evidence the contract between, etc. [*or other paper*] and the agreements of —, 18—, thereto attached,

¹ Where the ruling out of testimony is assigned for error, the bill must show as much of the evidence as to show the true state of the case at the time, and the right to introduce the evidence. *Landis v. Dayton*, W. 659.

² A reference to a deposition on file, merely stating the deponent's name, or giving some artificial mark on the deposition itself, is not sufficient; it must be attached to or made part of the bill of exceptions. *Wells v. Martin*, 1 Ohio St. 386; *Hicks v. Person*, 19 Ohio, 446. See note 1, p. 496.

³ The caption and authentication of depositions should not be copied into the record, unless some questions arise in them. *Nye v. Watt*, W. 537.

⁴ An affidavit can not be noticed on error, unless brought into the record by the bill of exceptions. And even where affidavits read on the hearing of a motion are copied into the record by the clerk, without any bill of exceptions taken for that purpose, they can not be considered on proceedings in error. *Sleet v. Williams*, 21 Ohio St. 82.

See also note 1, p. 496.

which is hereto attached and made part hereof,¹ marked "Exhibit B."

7. And the plaintiff further to maintain the issues on his part offered to give in evidence a deed from, etc. [*or any paper*], and the defendant objecting to the same being taken in evidence, the court refused to allow the same to be read,² to which ruling the plaintiff at the time excepted; which said paper is hereto attached and made part hereof, marked "Exhibit C."

8. And further the plaintiff offered the testimony of N. L. to prove that, [*or offered to produce evidence tending to prove that,*] etc. [*state the facts which such testimony tends to prove,*³ *or set forth the testimony*], and defendant objecting, the court refused to allow him to testify in the case [*or refused to receive the said evidence*] for the reason that, etc.,⁴ to which ruling of the court the plaintiff at the time excepted.

¹ Papers not set out in, or attached to, the bill of exceptions, or in some way so connected therewith as to make them a part thereof, can not be taken as parts of the bill. *Wells v. Martin*, 1 Ohio St. 386; *Busby v. Finn*, 1 Ohio St. 409; *Baker v. Scovill*, Superior Court of Cincinnati, General Term, 1870, 2 C. S. C. R. 37.

In the case of *Busby v. Finn*, *supra*, the court (Thurman, J.) said: "We do not mean to say that it is indispensable to copy into, or actually attach to, a bill of exceptions every paper making part of it, though *Hicks v. Person*, 19 Ohio 446, seems to require this. Such a description may be given of an exhibit as to leave no doubt of its identity when found among the papers."

As to amending a bill of exceptions in annexing papers, see *ante* p. 91.

² To justify the reversal of a judgment, where the error complained of is the rejection of evidence, its materiality must affirmatively appear upon the face of the record. *Courtright v. Staggars*, 15 Ohio St. 511.

³ When an exception is taken to the ruling of a court in rejecting testimony offered by the party excepting, it is not necessary that the bill of exceptions should set out the testimony offered and rejected; it is sufficient, in such case, to state the facts which such testimony tended to prove. *Himrod Furnace Co. v. Cleveland and Mahoning R. R. Co.*, 22 Ohio St. 451.

⁴ The record should show upon what ground the witness was rejected. *Armstrong v. Clark*, 17 Ohio, 495.

9. And the plaintiff further to maintain the issues on his part offered in evidence the record of the case of A. 1 against M. N., numbered — in the — court of —, a copy of which is hereto attached and made part hereof,¹ marked "Exhibit D."

And thereupon the plaintiff rested his case.

10. And the defendant, to maintain the issue on his part, offered, etc. [*in the same form as above.*]

And thereupon the defendant rested.

11. And thereupon the plaintiff further to maintain, etc.

And thereupon the plaintiff rested.

And the foregoing is all the evidence given or offered by either side upon the trial of the case.²

12. And at the close of the testimony, and after the conclusion of the argument of the respective counsel [*or before the argument*], the plaintiff requested the court to give the

¹ See note 1, p. 496, as to making papers part of a bill of exceptions in general.

Thurman, J., in commenting on the case of *Busby v. Finn*, *supra*, said: "The bill states that 'the defendants gave in evidence the record of the judgment in Marion county, hereto attached, marked A.' but no such record is attached, or marked as filed, or mentioned in the pleadings, or referred to in any return or certificate of the clerk of the court. It is therefore manifest that *any* record of *any* judgment of *any* court in Marion county, and between *any* parties, satisfies the description in the bill of exceptions, provided it is marked A;" and held that the evidence was not properly before the court.

² To entitle the party to review, the bill of exceptions must show upon its face that it contains *all* the evidence given upon the trial, and acted upon by the court below. *Ide v. Churchill*, 14 Ohio St. 372; *Tilton v. Morgaridge*, 12 Ohio St. 98; *Cantwell v. State*, 18 Ohio St. 477; *Eastman v. Wright*, 4 Ohio St. 155; *Wilson v. State*, 2 Ohio St. 319; *Farmer's College v. Butler*, 18 Ohio St. 418.

following charges to the jury, each of which the court gave, to wit:

[*Set out in full.*]

13. And at the same time the plaintiff asked the court to give the following charges to the jury, each of which the court refused to give: to each of which refusals the plaintiff then and there excepted. To wit:

[*Set out in full.*]

14. And at the same time the plaintiff asked the court to give the following charge to the jury:

[*Set out charge.*]

which charge the court refused to give, but gave it modified as follows:

[*Set out charge.*]

To which refusal to give the charge as asked, and to which charge as given the plaintiff at the time excepted.

15. And [the arguments of the counsel for the respective parties being concluded] the court then charged the jury as is set forth in the copy thereof hereto attached and made part hereof,¹ marked "Exhibit E."

And the plaintiff at the time excepted to said charge as follows:

1. To the portion of the third paragraph thereof, etc. [*set out specifically the matter excepted to*²], on the ground that,² etc.

¹ Otherwise, it will not be regarded as a part of the record. *Hallam v. Jacks*, 11 Ohio St. 692.

² Where exceptions are taken to a general charge given by the court to the jury, unless the party's exception points out specifically the part or proposition of the charge excepted to, and the grounds of his exception, a reviewing court is not bound to take notice of the exception. *Adams v. The State*, 25 Ohio St. 584, 587.

In the case of *Taylor v. Boggs*, 20 Ohio St., 516, 534, counsel for defendant in error claimed that an exception in these words—"to which charge

Said "Exhibit E," and the said special charges given as hereinbefore stated, comprise all the charges of the court as given to the jury at said trial.

16. Whereupon the court gave judgment for the defendant, [or the jury retired for deliberation, and returned a verdict for the defendant.] as appears of record in the cause; and the plaintiff thereafter filed a motion to set aside the said judgment [or verdict] and for a new trial, and the same was argued by counsel and submitted to the court, which, upon consideration, overruled the same, [and entered judgment upon said verdict,] as also appears of record.

And the plaintiff thereupon excepted to the overruling of said motion, and presented this his bill of exceptions, and prayed that the same be allowed, signed, sealed, and made part of the record, which is accordingly done this — day of —, 18—.

[Signed,]

J. D.,
Judge of the Court of Common Pleas
of — county, Ohio.

BILL OF EXCEPTIONS

FROM THE GENERAL TERM TO THE SUPREME COURT IN A CASE RESERVED TO
 GENERAL TERM.

Superior Court of Cincinnati,

A. B. }
 vs. } Bill of Exceptions.
 C. D. }

Be it remembered that on the trial of this action at the — term, 18—, of the Superior Court of Cincinnati in general term convened, the said action came on to be heard as reserved from special term upon the certified bill of evidence, which said bill of evidence with its showing of the ruling of the court in special term in admitting and rejecting evidence, is hereto attached and made part hereof. marked "Bill of ev

so given, and to every part thereof, the plaintiff excepted"—was not sufficient, because given in gross. The court did not pass on the question, though the judgment below was reversed. But in this case of *Adams v. The State, supra*, the decision goes to the extent of saying that such an exception can not be sustained, if any part or proposition of the charge is good.

idence," and contains all the testimony of both parties in the action.

And upon the hearing of said cause at general term the said court gave judgment for the — as appears of record in the case.

The — then moved the court for a new trial, which motion the court upon consideration overruled as also appears of record.

And the said — thereupon excepted to the overruling of said motion, and presented this his bill of exceptions, and prayed that the same be allowed and made part of the record of the case, which is now accordingly done on this — day of —, 18—.

[Signed,]

A. Y., [SEAL.]

M. H. T., [SEAL.]

T. A. O., [SEAL.]

Judges of the Superior Court of Cincinnati

BILL OF EXCEPTIONS

WHEN THE EVIDENCE IS EMBODIED IN AN AGREED STATEMENT OF FACTS.

State of Ohio, Hamilton County Court of Common Pleas.

A. B.	}	Bill of exceptions.
vs.		
C. D.		

Be it remembered that at the — term, 18—, of the — court of —, before the Hon. J. D., judge, this cause came on to be heard upon the pleadings and the evidence, all of which evidence in behalf of both plaintiff and defendant is set out in the agreed statement of facts hereto attached and made part hereof, marked "Exhibit A."¹

And the court, after consideration, etc. [*conclude as in other cases.*]

The bill of exceptions from the District Court in appealed cases will be made out in the same general form as the two above. In error cases no other bill is required than the one used from the Common Pleas, as that puts everything on the record, not already so, up to that time, and the record shows all subsequent proceedings.

¹ An agreed statement of facts, which constitute the evidence in a case, can not be regarded as a special verdict, and forms no part of the record, unless made so by bill of exceptions. *Bank of Virginia v. Bank of Chillicothe*, 16 Ohio, 170.

But if the case was tried on an agreed statement of facts, which facts are admitted by the parties, leaving for the court nothing to find, and only the naked duty of declaring the law upon the given statement of admitted facts, and the record shows that the parties stipulated that the facts should be taken as admitted, and judgment entered thereon, according to their legal rights, such an agreed statement may be properly regarded as a special verdict, and will be deemed a part of the record upon error. *Clinton Bank of Columbus v. Ayres*, 16 Ohio, 282, 287.

Consequently, in the last-mentioned case, no bill of exceptions is necessary, as the record shows the whole case.

In criminal cases the bill of exceptions is governed by the same rules as in civil, and it may be made in the same general form. It is more generally the case, however, that separate bills are put in for the several supposed errors as they arise, in criminal than in civil cases.

But, as some of the matters excepted to are of a different nature from those found in civil cases, a few of them are given in the following form as examples. They may be put into one bill or made out separately, as the attorney deems best. For exceptions taken in the examination of witnesses and the charging of the jury, the form of the bill may be the same as in civil cases.

BILL OF EXCEPTIONS

IN CRIMINAL CASES.

[*Heading and title as in civil cases.*]

Be it remembered that on the — day of —, A. D. 18—, being one of the days of the — term in said year of the Court of Common Pleas of — county, and being the day on which this cause was set for trial, and upon the calling of the case for trial, the defendant objected to being put on his trial on that day for the reason that, etc. [*set out*], but the court decided, etc., and notwithstanding the objection of the defendant put him immediately on trial. To which decision of the court, and to its action in the premises, the defendant then excepted as erroneous.

Be it remembered that afterwards, on the day above mentioned, at the trial of the said defendant, while a jury was being impaneled to try the issue in said case, one J. L. was called by the sheriff, and was sworn and examined touching his qualifications to sit as a juror upon the trial of said cause; whereupon he testified as follows [*set out testimony*].

And the above was all the testimony of said J. L., whereupon challenge for cause was tendered by the — which the court sustained [*or overruled*], and defendant by his counsel¹ at the time excepted.

Be it remembered that afterwards, on the day above mentioned, before the jury had been impaneled or sworn, the defendant challenged the array of the jury returned by the sheriff for the reason that, etc., [*set out reason*]. And the defendant in support of his challenge called, etc. [*set out*]. The prosecuting attorney then called, etc. [*set out*], which was all the testimony adduced upon occasion of the challenge above recited. And thereupon the court decided, etc., and overruled said challenge, to which ruling the defendant excepted as erroneous.

And now the defendant presents this his bill of the several exceptions by him taken in manner, and at the times, above set forth, and prays, etc. [*as in civil case*].

MANDATES.

The mandate from the court of error to the inferior court may be in the following

FORM.

The State of Ohio, } District Court,
 — County. } — Term, 18—.

To the honorable the Court of Common Pleas in and for — county, Ohio, greeting :

Whereas, in a certain action which was lately heard in our said District Court, wherein — was plaintiff, and — defendant, the following — was entered on the — day of —, 18—, viz :

This cause came on for hearing, etc. [*Copy order or judgment in full.*]

You are, therefore, hereby commanded, without delay, to cause the said — to be carried into complete execution according to the tenor thereof.

Witness, T. B. D., clerk of our said District Court, and the seal thereof, at —, this — day of —, A. D. 18—.

[SEAL.]

T. B. D.,
 Clerk.

PRACTICE, PLEADINGS, AND JOURNAL ENTRIES

UNDER THE ACT

For the Restoration of Lost Records.

81 OHIO L. 159.

- I. SUBSTITUTION OF PLEADINGS, PROCESS, AND OTHER FILES IN PENDING ACTIONS—
 1. Motion for leave to substitute.
 2. (Sec. 5084.) Order substituting.
 3. (Sec. 5084.) Same, when papers are few.
- II. SUPPLYING OR REPLACING THE RECORD IN ACTIONS WHEREIN FINAL JUDGMENT HAS BEEN RENDERED—

First. From certified or agreed copy of record.

 - 4 (Sec. 5339a, 1st, 2nd, and 4th.) Order.

Second. From the original pleadings, entries, papers, etc.

 5. (Sec. 5339a, 3d.) Order.

Third. From evidence, when record and papers are partially or totally destroyed.

 6. Application.
 7. Precepe for summons.
 8. Affidavit of non-residence.
 9. Entry approving publication.
 10. (Sec. 5339b.) Order for supplying, etc.
 11. (Sec. 5339b.) Same, when record is made up and presented to the court.
- III. RECOPYING ORIGINAL PAPERS AND RECORDS.
- IV. ESTABLISHING THE FACT OF THE EXISTENCE AND THE SUBSTANCE AND EFFECT OF A JUDGMENT, PRIOR TO THE DESTRUCTION OF THE RECORD.
 12. Application.
 13. (Sec. 907b.) Decree finding existence, etc., of judgment.
- V. ESTABLISHING THE FACT OF THE EXISTENCE OF A LOST MORTGAGE OR OTHER LIEN, DEED, OR WILL, AND ITS SUBSTANCE AND EFFECT.
 14. Petition.
 15. (Sec. 907b and c.) Decree finding existence, contents, etc.

I. SUBSTITUTION OF PLEADINGS, PROCESS, AND OTHER FILES IN PENDING ACTIONS.

The only provision relating to pending actions in this act is in section 5084, 81 Ohio L. 160, and is only an enlargement of a former provision. This section does not refer in terms to pleadings or other files being destroyed by fire, riot, or civil commotion, but, of course, is applicable to such cases as well as others; but there is no provision for paying the costs in such cases out of the county treasury. Neither is there any statutory provision for restoring the appearance docket in pending cases, except so far as the posting of the substituted copies restores it.¹ When a copy of a pleading or other paper is filed and the original appearance docket has been destroyed, the title of the case and the record, on the docket, of the sheriff's return of process ought to be re-entered.

Unless all parties are before the court consenting to the substitution, a motion should be filed by the party applying, which will come up for regular hearing, all parties to the action thus having notice.

1. MOTION FOR LEAVE TO SUBSTITUTE PLEADINGS, ETC.

Court of Common Pleas, Hamilton County, Ohio.

55,026.] A. B. }
 vs. }
 C. D. et al. }

Now comes the —, and moves the court for leave to substitute copies of pleadings, process, and other files in this action.

Or the papers to be substituted may be designated particularly.

On the motion being granted, the order may be made in the following form when the papers are numerous.

2. (Sec. 5084, 81 Ohio L. 160.) *Order substituting pleadings, process, etc., in pending actions.*

[*Title.*]

The pleadings, process, and other papers filed in this action, together with the entries upon the appearance docket and journal, having been lost or destroyed, and the — now presenting to the court copies [*or*, substantial copies] thereof, it is ordered on his application that they be filed and entered instead of, and substituted for, the originals as of the dates when such originals were filed and entered, as follows, to wit:

Copy of petition. Original filed January 20, 1882.

¹ But see sec. 5339c as amended 82 Ohio L. 240, and *post*, p. 517.

Copy of summons and return. Original issued January 20, 1882. Returned and filed February —, 1882.

Copy of demurrer to petition. Original filed February 25, 1882

Copy of entry overruling demurrer. Originally entered March 4, 1882.

Copy of answer. Original filed by leave of court April 1, 1882.

And the clerk is directed to enter upon the appearance docket the dates of filing the originals and also the return shown on each substituted writ, or process.

And the court find that the orders and entries upon the journal as originally entered were in the words and figures following [*or*, were substantially as follows], to wit :

A. B. }

vs.

C. D. }

[*Copy first entry in full.*]

And that the above order was originally entered on the — day of —, 18—.

A. B. }

vs.

C. D. }

[*Copy second entry in full*], etc.

And that the above order was originally entered on the — day of —, 18—.

It is unnecessary to make any further entry on the journal of the filing of the separate pleadings and papers, but they should each be posted on the appearance docket in the same order and form as entered on the journal in the above entry, thus :

1885. Feb. 6. Min. 480. Order substituting copies of pleadings, etc., as follows :

Copy of petition. Original filed January 20, 1882.

Copy of summons and return. Original issued January 20, 1882. Returned and filed February —, 1882. Indorsed as follows, to wit [*copy the return indorsed on the back of the copy*] :

Copy of demurrer to petition. Original filed February —, 1882.

Copy of entry overruling demurrer. Originally entered March 4, 1882.

[*And so on to the end of the papers filed.*]

In case the papers lost are few, the entry may be as follows :

3. (Sec. 5084, 81 Ohio L. 160.) *Order substituting pleadings, etc., in pending actions.*

[*Title.*]

It appearing to the court that the petition filed in this action on the — day of —, 18—, and the summons issued on the — day of —, 18—, have been lost or destroyed, together with the entries thereof upon the appearance docket, and the plaintiff now presenting to the court copies [*or, substantial copies*] thereof, it is ordered on his motion that they be filed and substituted for the originals, as of the dates when such originals were filed and issued.

II. SUPPLYING OR REPLACING THE RECORD IN ACTIONS WHEREIN FINAL JUDGMENT HAS BEEN RENDERED.

By the “record” referred to in sections 5339*a* to 5339*e*, inclusive, of the act is evidently meant, not the appearance docket or journal entries, but the final record of the case required by sections 5332, 3, 4, 5, and 8 of the Revised Statutes.

The proceedings under the above sections should be in, and under the number of, the original case.

First. From certified or agreed copy of record.

When the record can be restored under the first, second, or fourth subdivision of section 5339*a*, the court proceedings are simple, and the application may be by motion, as in pending cases. The entry as follows :

4. (Sec. 5339*a*, 1st, 2nd, and 4th, 81 Ohio L. 160.) *Order for supplying a lost record by certified or agreed copy.*

[*Title.*]

It appearing that the record in this case was lost or destroyed in the burning of the court-house in this county, and the — now presenting to the court a certified copy thereof [*or, a certified copy of the record thereof in the Supreme Court:*] [*or, a substantial copy thereof, agreed to and signed*

by all the parties to the action, or their representatives or attorneys], thereupon, on his application, it is ordered that the lost record be supplied and replaced by the copy aforesaid; and that said copy be recorded by the clerk in place of the original. And it is ordered that the costs thereof be paid out of the county treasury.

Second. From the original pleadings, entries, papers, etc.

Under the third subdivision of section 5339a, it is necessary to make a new record from the materials from which the original was made. The application in this case may also be by motion, as in pending actions. The entry as follows:

5. (SEC. 5339a, 3rd.) *Order for restoring a lost record from the original papers in the case.*

[*Title.*]

It appearing that the record in this case was lost or destroyed in the burning of the court-house in this county, and the — now presenting to the court the original pleadings, entries, and other papers and files in the case, thereupon it is ordered on his application that the record so lost be supplied and replaced by a new record thereof, to be made by the clerk from such original papers in the same manner as in case of the original record, and that the costs thereof be paid out of the county treasury.

Third. From evidence, when record and papers are partially or wholly destroyed.

In the above case, under section 5339b much difficulty is experienced in restoring the record, and considerable diversity in practice has existed. The application should set forth the substance of the record so lost or destroyed, and be verified in the manner provided for the verification of pleadings in a civil action, and summons must issue and service be made upon all persons interested in, or affected by, the original judgment or final entry in the manner provided by law for the commencement of civil actions. This application should be made in the original case, under the original number, as it is a "proceeding," and not an action, and much confusion will be avoided by keeping the proceedings together. No further pleadings are permitted.

The application is very important, as in it the whole case must be

stated, and the order of restoration must be responsive to it. Its form will naturally vary to conform with the extent of the loss.

If any original pleading or other paper is in existence, which was properly a part of the original record, it may be referred to in the application and attached as an exhibit.

In case of the destruction of a paper, a substantial copy of it may be made, and in the same manner be referred to and attached as an exhibit, or the substance of it may be set forth in the application, at the option of the applicant.

The following form will show the manner of making the application in each of the foregoing cases :

6. APPLICATION.

Court of Common Pleas, Hamilton County, Ohio.

<p>12,471.] A. B. C.D., E. F. and Mrs. K.G.</p>	}	<p>vs. Application to restore lost record.</p>
---	---	--

And now comes the said A. B., and represents to the court that on the 2d of September, 1854, he commenced an action in this court, which was numbered 12,471, for [*state object of suit*], against C. D., E. F. and E. G., and such proceedings were had therein that at the January term of this court in the year 1857 a final judgment was rendered, and thereupon a full and complete record of the case was made as required by law. That said record was lost or wholly destroyed by fire at the burning of the court-house in this county, in March, 1884, * and can not be supplied or replaced as provided in section 5339a of the act passed April 12, 1884, 81 Ohio L. 159.

This applicant further states that in and by the record so made up and entered it was set forth and appeared as follows, to wit :

That the petition of the said plaintiff was filed on the 2d day of September, 1854, a true copy of which [*or, in case of a substantial copy being made up, say, a copy in substance of which*] is hereto attached, marked "Exhibit A," and made a part hereof.

[*In case of the loss of the petition, instead of a copy in substance being attached, as above, the last clause may be as follows :*]

That in the petition of the said plaintiff, filed on the

2d day of September, 1854, it was alleged substantially as follows, viz.:

[*Here state substance of petition.*]

Applicant further states that by the said record it appeared that a summons against all of said defendants was duly issued on said petition, and that all of the said defendants were duly served with process, and as to so much of the petition as claimed a discovery of advancements a demurrer was filed by the said C. D., which demurrer was by the court overruled, and leave was given said defendants to answer.

That an answer was filed by said defendants on the 1st day of July, 1853, * in which, etc. [*here give substance of the answer, or introduce it in one of the ways shown above. But if in any case it happens that the applicant is unacquainted with even the substance of the pleading or other paper, make the statement as follows, beginning at *:* But the applicant is unable to state the purport or contents thereof, and prays it may be supplied if ascertained.]

That an amended petition was subsequently filed by leave of the court setting forth, etc. [*state contents as above.*]

That an order of this court was made in the case at the April term, 1855, and entered on the journal, * finding and ordering that, etc. [*state substance of order; or, if the original is preserved, say, beginning at *:* which order as originally drawn by the attorneys and entered by the court is hereto attached, marked "Exhibit B," and made a part hereof.]

If the entry be a judgment or decree, application may be as follows:

That afterward, on the 2d day of April, 1858, the said action came on for hearing, and an order [*or, judgment; or, decree*] was then made and entered upon the journal of the court, * which order [*or, judgment; or, decree*] as originally drawn by the attorneys and entered by the court is hereto attached, marked "Exhibit A," and made a part hereof [*or, beginning at *, finding upon the pleadings and evidence that, etc., and ordering and adjudging that, etc.*]

If the case is tried before a jury, it may be stated as follows:

That on the — day of —, 18—, a jury was duly impaneled and sworn in said action, and the cause progressed, and that on the — day of —, 18—, the jury returned a verdict finding, etc. [*state verdict or its purport*].

That on the — day of —, 18—, the said — filed a motion for a new trial, which was on the — day of —, 18—, overruled by the court, and judgment entered on said verdict, which judgment, etc. [*state as in one of the forms given above*].

If it be a case in the District Court, the following may be used

That on the — day of —, 18—, the transcript and original papers of said action were delivered to the clerk of the District Court, and by him docketed as case No. — in said court, and a petition in error was filed by the said —, which, etc. [*as in case above*].

And so continue with each step of the original case.

In case of there being persons interested in the judgment who were not parties to the action, make a statement of the facts a part of the application, as follows:¹

The applicant further says that Mrs. K. G., the widow of E. G., deceased who was a party to the original judgment, has some interest in the estate therein set off and divided to him, the nature of which is unknown to applicant. He furthermore states that he has been informed, and believes, that sundry portions of the land which were set off to some of the parties in the said partition have been sold and conveyed, or have otherwise passed to divers persons whose

¹ NOTICE TO INTERESTED PARTIES.

As section 5339*b* provides that "summons shall issue and actual service or service by publication shall be made upon all persons interested in or affected by said original judgment or final entry in the manner provided by law for the commencement of civil actions," etc., the same forms will be used as in civil actions, when the names of such parties are known. But there may be many others interested whose *names* are unknown, and therefore do not properly come under the provisions of section 5048 Revised Statutes, and who are not heirs or devisees, and therefore do not come under section 5053 Revised Statutes.

In such cases it is doubtful if publication against such unknown parties would be sufficient to bind them.

names and places of residence are wholly unknown to said applicant, and whom he can not otherwise describe.

He therefore prays that the said Mrs. K. G. may be made a party, and that all persons who by purchase or otherwise have acquired an interest in any of the lands which were included in the proceedings in said suit may, when discovered, be admitted as parties to this proceeding.

The applicant therefore prays the court that the said record may be supplied and replaced in the manner provided by the said statute passed April 12, 1884, and for such other and further relief as from the nature of the case may be required.

K. T. & M.,

Attorneys for Applicant.

State of Ohio, Hamilton County, ss.:

A. B., the applicant aforesaid, being duly sworn, says that the facts stated in the foregoing application are true, as he verily believes.

A. B.

Sworn to before me, and subscribed in my presence, this
— day of —, 18—.

C. W.,

Notary Public, Hamilton County, Ohio.

7. PRECIPUE FOR SUMMONS.

Court of Common Pleas, Hamilton County, Ohio.

12,471.] A. B. }
 cs. }
 C. D. et al. }

To the clerk:

Issue summons in above proceeding for C. D., E. F. and K. G.

Indorse summons as follows: Application by A. B. for restoration of the record destroyed by fire.

K. T. & M.,

Attorneys for Applicant.

In case of non-resident parties, the same affidavit and order will be made as in civil actions for service by publication.

8. AFFIDAVIT OF NON-RESIDENCE, ETC.

State of Ohio, }
Hamilton County, } ss.

A. B., the applicant in the above named proceedings, being first duly sworn, says that E. F., one of the parties to the foregoing action, is a non-resident of the State of Ohio, and that service of a summons in said proceeding can not be made upon him in the State of Ohio.

Applicant further says that the proceeding aforesaid is one in which service by publication is authorized by section 5048 Revised Statutes, and section 5339b of the act passed April 12, 1884.

A. B.

Sworn to, etc.

After publication made and proof filed in any of the above cases, an entry approving the same should be made as in other cases.

9. *Entry approving publication.*

[*Title.*]

Now comes A. B., the applicant for restoration of the record herein, and offers proof of publication of the pendency and prayer of said application; and the court finding said publication and proof in all respects regular and according to law and the former order of this court, do hereby approve the same.

On the application being heard and granted, the entry may be in the following form:

10. (Sec. 5339b.) *Order for supplying lost record from evidence.*

[*Title.*]

The application for the restoration of the record in this case now coming on to be heard, the court find that due legal notice thereof has been given to all parties to this proceeding, that the original record of this action has been lost or destroyed as stated in said application, and that it can not be supplied or replaced as provided in section 5339a, 81 Ohio L. 160. And the — now producing evidence sufficient to enable the court to find the substance

of such record material to the preservation of the rights of the parties thereto, it is ordered that a new record be made in this case, reciting the substance and effect of the original. * And the court find that the exhibits attached to the application are respectively the original, or copies in substance of the original, pleadings, proceedings, orders, and judgments of the court as therein alleged, and that the statements made in said application are substantially correct.

It is therefore ordered that said exhibits be allowed, and the statement of facts in said application be admitted as part of the record of this case, and that a full record thereof be made by the clerk of this court, and that the costs be paid out of the county treasury.

Unless the papers from which the new record is to be made are quite full and complete, the substance of it should be made up and shown to the court by the attorney, together with the papers from which it is made. In that case the entry may be as follows :

11. (Sec. 5339b.) *Order supplying lost record—and the same made up and presented to the court.*

[*Title.*]

*As in the last to * and conclude*—And the — now presenting to the court a record made from the several pleadings, abstracts, and papers offered in evidence in the case, the court find the same to be substantially correct, and order that it be substituted and recorded as and for the original record. It is further ordered that the costs of this proceeding be paid out of the county treasury.

III. RE-COPYING ORIGINAL PAPERS AND RECORDS, ETC.

By an act passed May 4, 1885, 82 Ohio L. 240, a defect in the original act for the restoration of lost records was remedied. It provides for re-copying original papers and restoring and indexing the appearance dockets, and for re-copying parts of the record saved from destruction. The order in the first case may be as follows :

(Sec. 5339e, 82 Ohio L. 240.) *Order for re-copying, etc., original papers.*

[*Title.*]

It appearing to the court that the journals and the appear-

ance docket wherein the proceedings in this case were entered and docketed were destroyed at the burning of the court-house, but that the original papers in the case were saved, it is now on motion of the — ordered that the original entries be re-entered upon the journal of this court; and that the appearance docket entries of the case be restored, and that the cost thereof be paid out of the county treasury.

IV. ESTABLISHING THE FACT OF THE EXISTENCE AND THE SUBSTANCE AND EFFECT OF A JUDGMENT, PRIOR TO THE DESTRUCTION OF THE RECORD.

It will often happen that the restoration of the final judgment or decree in an action will answer all the purposes required, as where the object is simply to preserve the lien on real estate. In that case the restoration should be under section 907b. The proceedings should be under the number of the original case. The application may be in the following form:

12. APPLICATION.

Court of Common Pleas, Hamilton County, Ohio.

12,471]	A. B.	}	Application to have established the fact
vs.			of the existence of a judgment prior
	C. D. and E. F.	}	to the destruction of the record.

*As in application on page 8 to *, and continue:]*

The applicant further states that the entry of the judgment rendered in such action, upon the journal of the court, was also destroyed by the burning of the court-house as aforesaid, and that neither the original entry nor any certified copy thereof can be found.

The applicant further says that the judgment aforesaid was in the words and figures [*or, was substantially*] as follows, viz .

[Here give copy or substance of judgment.]

The applicant therefore prays that a decree may be entered by the court establishing the fact of the existence, prior to the destruction as aforesaid, of such judgment and the substance and effect thereof; and for such other and further relief as from the nature of the case may be required.

W. & W., Attorneys for Applicant.

[Verified as former application.]

The service upon the above application will be, in form, as in the last.

13. (SEC. 907*b*, 81 Ohio L. 163.) *Decree finding existence of a judgment, and the substance thereof.*
[*Title.*]

The application filed in this case by J. D. for having established the fact of the existence of a judgment, in this action, and its substance and effect now coming on to be heard, the court find that due legal notice thereof has been given to all parties to this proceeding: that, as claimed in said application, a judgment was rendered in the above named action on the — day of —, 18—, in favor of the said J. D. and against the said C. D. and E. F., and duly recorded, and that the record and entry thereof were lost or destroyed in the burning of the court-house of this county, and that no certified copy thereof can be found. And the court thereupon find said judgment to have been in words and figures [*or, to have been in substance and effect*] as follows, to wit:

[*Title.*]

[*Copy in full or set forth the substance of the judgment.*]

And it is ordered that the costs of this proceeding, and of the record of this decree, be paid out of the county treasury.

V. ESTABLISHING THE FACT OF THE EXISTENCE OF A LOST MORTGAGE OR OTHER LIEN, DEED, OR WILL, AND ITS SUBSTANCE AND EFFECT.

The proceeding, under section 907*b*, 81 Ohio L. 163, 164, is from its nature necessarily a separate action. But it is to be instituted and continued in accordance with the provisions of section 5339*b*.

The application must therefore have all the formalities of a petition in civil actions, and it must be numbered as a new action upon the the docket.

Under section 907*c* a new action is provided for.

14. PETITION.

Court of Common Pleas, Hamilton County, Ohio.

[*Title.*]

Now comes the said A. B., and represents to the court that on the — day of —, 18—, he became the holder and owner of a mortgage lien on the following described real estate, to wit [*describe*]:

That said mortgage was duly executed by said C. D. and delivered, etc. [*state full facts of execution, record, and ownership*].

The petitioner further says that the record of said mortgage deed was lost or destroyed by fire at the burning of the court-house in this county in March, A. D. 1884, and that neither the original mortgage nor a certified copy thereof can be found.

Wherefore, the petitioner prays that a decree may be entered by this court establishing the fact of the existence, prior to such destruction, of the mortgage aforesaid, and also its substance and effect, and for such other and further relief as from the nature of the case may be required.

R. T., Attorney for Petitioner.

[*Verified as in other cases.*]

The petition under section 907*c*, to establish the existence, etc., of a lost deed or will, may be in general as the above.

The decree in all of the above cases may be in the same general form, as follows :

15. (Secs. 907*b* and 907*c*, 81 Ohio L. 164.) *Decree finding existence, contents, etc., of any lost lien, deed, or will.*

[*Title.*]

The petition in this case now coming on for hearing, the court find that due legal notice thereof has been given to all parties to this action, and that they are all properly before the court. The court further find as set forth in the petition that on the — day of —, 18—, the said C. D. made, executed, and delivered to the said A. B. the mortgage deed therein set forth [*or describe any other lien, deed, or will*]; that the same was duly filed and recorded in the office of the — of this county (*or*, duly admitted to probate), on the — day of —, 18—, and that the record thereof was (*or*, that said will and the probate thereof were) destroyed by fire in the burning of the court-house of this county.

And it appearing that neither the original nor a certified copy of said instrument can be found, the court find from the evidence now adduced that the said — was in substance as follows, to wit: [*Here give substance of mechanics' lien, mortgage, or other lien, deed, or will.*]

It is therefore ordered that this decree be recorded in the office of the — of this county, and that the costs of this proceeding be paid out of the county treasury.

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